Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has explained that while "*jurisdiction* is a question of whether a . . . court has the power . . . to hear a case, ... *relief* is a question of the various remedies a . . . court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all[.]" *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). And, "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy[.] [T]he breadth or narrowness of the relief which may be granted . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 561 (1968).

In 2001, the Court of Appeals for the Ninth Circuit refused to extend comity to the tribal court judgment at issue here, holding that Petitioner's due process rights had been violated at trial in the Blackfeet court. *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136, 1151 (9th Cir. 2001). In 2010, on the sole ground of issue preclusion, that same court is allowing the Respondents to pursue enforcement of the judgment in tribal court, within the exterior boundaries of the reservation, against the assets of non-Indian Petitioner, an electric cooperative, on non-Indian fee land, including electric utility rights-of-way granted by Congress and by individual members of the electric cooperative.

In this context, the question presented is whether preclusion of the issue of tribal subject matter

jurisdiction to *hear* a case bars the federal courts from considering whether Respondents may enforce *in tribal court* the relief they were granted there – a substantial money judgment – despite the lack of due process at the trial.

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Glacier Electric Cooperative, Inc. has no parent corporation and that no other publicly held corporation owns 10% or more of its stock.

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BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its memorandum disposition on June 25, 2010. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review that opinion on a writ of certiorari.

CONSTITUTIONAL PROVISION

No person shall be . . . deprived of life, liberty, or property, without due process of law[.] U.S. Const. amend. V.

STATUTORY PROVISION

"No Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law . . . ." 25 U.S.C. § 1302(8).

STATEMENT OF THE CASE

1. Tribal Court Proceedings

This case began in 1992 in Blackfeet tribal court on the Blackfeet Indian Reservation in Montana against Glacier Electric Cooperative ("GEC"), alleging tribal law claims for breach of Tribal Employment Preference Ordinances ("TERO") and Blackfeet constitutional provisions, and state law claims for breach of contract, constructive fraud, defamation, and negligent misrepresentation. Doing business as Glacier Construction, Inc. with headquarters on the reservation, two enrolled tribal members and one non-tribal member filed the lawsuit on behalf of themselves and Glacier Construction. The lawsuit arose when GEC terminated its relationship with Glacier Construction, fearing liability from that company's sub-standard work and use of untrained employees in replacing utility poles and other tasks associated with maintaining GEC's electrical distribution system in Montana's Glacier, Pondera, and Flathead counties.

GEC, a non-tribal member, unsuccessfully contested in tribal court that court's jurisdiction over the dispute. In 1993, trial before an all-Blackfeet jury resulted in a judgment against GEC for $2,157,181.60, including punitive damages, plus Glacier Construction's costs and court and jury costs, at the legal rate of interest until paid. App. 132a-134a. In 1995, the tribal appeals court upheld the judgment except for the tribal law claims. There was no reduction of the amount of the judgment.

2. Comity Proceedings in Federal District Court and the First Appeal in *Bird*

In 1996, Glacier Construction petitioned the federal district court in Great Falls, Montana to recognize and enforce the judgment as a matter of comity. On cross-motions for summary judgment, GEC argued that its fundamental due process rights were violated in tribal court and that the tribal court lacked subject matter jurisdiction. On January 21, 1998, District Judge Hatfield ruled that the tribal court did have jurisdiction, under the exceptions recognized in *Montana v. United States,* 450 U.S. 544, 564-66 (1981), to the general rule that there is no tribal jurisdiction over non-tribal members. App. 84a-97a. One year later, on January 22, 1999, Judge Hatfield ruled that GEC was accorded due process at trial, and held that "the underlying tribal court judgment is entitled to recognition and enforcement in the federal courts." App. 80a.

GEC appealed the decision to recognize and enforce the judgment, limiting its argument to the due process requirement of comity. *See Wilson v. Marchington,* 127 F.3d 805, 809-11 (9th Cir. 1997)(explaining that due process and jurisdiction are mandatory requirements for the extension of comity to Indian tribes). GEC's brief described numerous due process violations. App. 169a-218a. The Ninth Circuit focused only on one: Respondents' closing argument. It held that Glacier Construction's inflammatory closing argument in tribal court was meant to incite the all-Blackfeet jury to decide against GEC and its manager on grounds of alleged historic oppression of whites against Indians, resulting in a violation of GEC's due process rights. The court reversed, refusing to extend

comity as a matter of law. *Bird,* 255 F.3d at 1152. In so doing, the court refused to "depart from traditional due process values requiring fundamental fairness" *or to weigh any tribal interests* because "the procedures in the Blackfeet tribal court system are similar to those of Anglo-Saxon law." *Id.* at 1143-44 (emphasis added). The court observed that the request for comity was based on a "tribal court judgment here arising from a tribal court system with express rules and procedures based on Anglo-Saxon law." *Id.* at 1144. At this point, GEC thought the case was probably over.

3. Enforcement Proceedings in Tribal Court and the Request for Injunctive and Declaratory Relief in Federal Court in *Sherburne*

In February 2002, the Respondents petitioned the *tribal* court for an Order to Enforce and Aid in the Execution of the Judgment, never mentioning *Bird*. They sought a debtor's exam in which

> the defendant/debtor, Glacier Electric Co-op, shall appear before the [tribal] Court concerning the property and other assets of the defendant that are located upon the Blackfeet Indian Reservation and subject to execution for the purpose of satisfying the underlying Judgment. See Title 25, Chap. 14, MCA (Proceedings in Aid of Execution), incorporated into the Blackfeet Tribal Law and Order Code of 1967 (as amended) pursuant to Chap. 2, Sec. 2 of said Code.

App. 224a. GEC contested this petition on various grounds, including the federally adjudicated violation of its due process rights at trial. App. 227a-230a.

Over the next *seven years* spent litigating enforcement in the tribal courts, GEC lost repeatedly, despite the fact the Respondents attempted to effect and/or reach GEC's off-reservation assets over which the tribe had no jurisdiction. For example, in 2003, the tribal court signed an order for a debtor's exam stating that GEC was "forbidden . . . from disposing of any of its property." App. 131a. A significant portion of GEC's assets are off the reservation, including its headquarters. Later, the Respondents requested more debtor's exams that purported to assert authority over off-reservation assets and/or persons and records. The tribal courts assented. App. 102a-103a; App. 107a-112a; App. 232a-234a; App. 113a-128a. In 2007, the Respondents filed a "Motion for Order Requiring Judgment Debtor to Submit to Examination" in which they requested that GEC's manager be ordered to appear in tribal court with various financial records relating to both on-and off-reservation assets. App. 232a-234a. In 2008, the tribal court granted that motion and ordered:

> All files pertaining to this cause will be brought into this Court and reviewed including all witnesses to this cause of action.
>
> The above pertains to the property located on the Blackfeet Indian Reservation. This includes equipment, easements, rights of ways, and all other property owned or controlled by Glacier Electric Co-Op.

App. 111a-112a. GEC's manager responded by pointing out: "All of that information is currently located off the Blackfeet Indian Reservation, either at Glacier Electric's headquarters in Cut Bank or

elsewhere." App. 236a. GEC's manager did not appear at the debtor's exam set for April 22, 2008. The tribal court then found GEC and its counsel in contempt:

> Plaintiff's Glacier Electric Co-op and their attorney, Paul R. Haffeman are in contempt of this court and fined one thousand ($1,000.00) dollars to be paid before the next hearing, which will be held on the 25th day of June 2008 at 11:00 o'clock a.m. Failure to appear without the manager and all records and documents pertaining to this case will result in further fines for contempt.

App. 103a.

On April 21, 2008, GEC filed a Complaint for Injunctive and Declaratory Relief in federal district court. App. 138a-150a. The relief GEC requested was: (1) that Respondents be enjoined from proceeding with a debtor's exam "directed at persons, documents and property located off the Blackfeet Reservation;" (2) that the court declare "the rights and legal relations of the parties regarding the due process rights of GEC and its employees;" and (3) that the tribal court judgment and all other orders of the tribal court [be declared] void because of a lack of subject matter jurisdiction." App. 150a.

On February 18, 2009, a hearing was held on cross-motions for summary judgment. App. 8a-41a. GEC stated:

> We are simply asking the court to enjoin the plaintiffs from continuing their tribal court

> enforcement efforts on the basis that they have–that the tribe itself has no authority to assist them in their enforcement efforts, because the judgment that's involved in this case is null and void because of a lack of due process.

App. 16a.

With respect to GEC's first request for relief, the court recognized that "the tribal court, by reason of [*Bird*], does not have any recognizable capacity to attempt to enforce its judgment off-reservation." App. 39a. At the hearing Respondents acknowledged this was a problem by agreeing to abandon their off-reservation collection efforts, informing the court: "our enforcement efforts would be solely as to assets located within the reservation. . . . there are substantial assets within the reservation."[1] App. 23a; App. 27a.

With respect to the third request for relief, the district court ruled *sua sponte,* without distinguishing between claim and issue preclusion, that the issue was "res judicata" because GEC had not appealed the 1998 ruling on tribal jurisdiction over the initial dispute and could not in 2009 collaterally attack that jurisdiction. App. 34a-38a.

But, the district court never decided the second request for relief: that it declare "the rights and legal relations of the parties regarding the due process

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[1] While Glacier Construction abandoned the issue of tribal jurisdiction over off-reservation records, it did not abandon the issue of off-reservation witnesses, including GEC's manager.

rights of GEC and its employees" following *Bird*. Apparently, the court thought this issue was subsumed in its *sua sponte* ruling on "res judicata." Nevertheless, this issue was directly before the court:

> So the anamoly in this case is that what we're talking about is a multi-million dollar judgment, which the Ninth Circuit Court of Appeals has already said is flawed by due process. And the defendants in this action are continuing to try to enforce that judgment. And we're asking that those enforcement efforts be stopped at this point in time and the case be brought to a final rest.

App. 17a. Respondents had acknowledged previously that this was the argument GEC was making:

> First and foremost, [GEC] contends in its Response Brief to this Court that the "Jurisdictional issue before the Court . . . is different than [sic] the jurisdictional issue considered by Judge Hatfield in 1998, because at that time the Defendants[] were making no effort to enforce their Judgment in Tribal Court."

App. 243a.

Thus, on the sole ground that GEC had not appealed tribal court jurisdiction in *Bird*, the district court decided GEC was barred from contesting Respondents' right to petition the tribal court to enforce the judgment – the *relief* given – despite the legal determination in *Bird* that: (1) GEC's due process rights had been violated and that (2) the

Respondents were held to traditional due process values because the Blackfeet had adopted Anglo-Saxon law.

In short, the court conflated tribal jurisdiction to *hear* this dispute with the question of what *relief*, if any, a tribal court may enforce where a non-tribal member's due process rights are violated at trial. The result was an erroneous application of the doctrine of res judicata[2] to the question of whether Respondents could enforce the judgment in tribal court.

4. The Second Ninth Circuit Appeal in *Sherburne*

In the unpublished one-page memorandum decision at issue here, the Ninth Circuit held: "[i]ssue preclusion attached to the district court's 1998 decision. . . . the determination of subject matter jurisdiction made by the district court was never disturbed." App. 2a-3a. To support its ruling, the court quoted *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997): "the existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment." App. 3a.

Like the district court, the Ninth Circuit conflated the question of what *relief*, if any, is available where due process is absent in a tribal court with the

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[2] Because in this Court's jurisprudence, "res judicata" is synonymous with claim preclusion, *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984), the Ninth Circuit's memorandum disposition agreed with Petitioner that issue preclusion, not claim preclusion, was the appropriate doctrine to consider.

question of *subject matter jurisdiction* over the underlying dispute. The *Marchington* quotation is puzzling. *Marchington* was concerned only with tribal subject matter jurisdiction over an accident on a state highway following this Court's decision in *Strate v. A-1 Contractors,* 520 U.S. 438 (1977). Neither *Strate* nor *Marchington* had anything to do with a federally adjudicated lack of due process in comity proceedings but where nevertheless, there were subsequent enforcement proceedings in tribal court. *Marchington* does not compel a "threshold inquiry" into *subject matter jurisdiction* when the major issue is the violation of GEC's *due process* rights in tribal court.

REASONS FOR GRANTING THE PETITION

1. Issue Preclusion Does Not Apply When the Issues are Not Identical and the Controlling Facts Have Changed

a. the issues are not identical

If the Blackfeet tribal courts can enforce this judgment, it cannot be due to issue preclusion. "Under [the doctrine of issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). But there is a caveat: issue preclusion "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged."

Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 599-600 (1948).

"Jurisdiction" is defined as "the general power to exercise *authority* over all persons and things within its territory" as well as "the power to . . . issue a decree." *BLACK'S LAW DICTIONARY* 855 (7th Deluxe ed. 1999)(emphasis added). What GEC is contesting is the tribal court's authority to issue decrees to enforce a judgment that was rendered without due process against a non-Indian electric cooperative, on non-Indian fee land, and against property not otherwise controlled by the Blackfeet tribe because it was generated and transmitted on non-Indian fee land. Because "the breadth or narrowness of the relief which may be granted . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter[,]" *Avco Corporation*, 390 U.S. at 561, the matter of tribal authority to order enforcement of such a defective judgment cannot be identical with the matter of a tribal court's initial jurisdiction over the subject matter of the dispute.

Applying *Montana* and its exceptions, District Judge Hatfield decided in 1998 *only* that the tribal court had subject matter jurisdiction over the original action alleging tribal and state claims. Respondents' subsequent *tribal court* enforcement efforts, made after the due process adjudication in *Bird*, were not before him, nor could they could have been. The questions raised at the initial stages of the dispute concerning tribal authority to hear the case are entirely different from those raised at the end concerning tribal authority to enforce a defective judgment.

Respondents argued to the Ninth Circuit: "if a Tribal Court of Appeals does not have the authority to enforce through contempt or other measures its execution procedures under its tribal code, then its jurisdiction is, in effect, nullified." App. 21a. This argument is misplaced. First, to challenge a court's authority to order relief following a defective judgment does not nullify that court's jurisdiction to hear the case initially. It simply challenges the court's authority to award any *relief* where fundamental fairness was lacking. "A plaintiff may have a cause of action [in tribal court] even though he be entitled to no relief at all[.]" *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979). Second, this argument is beside the point when the question surrounding issue preclusion is whether the jurisdiction to *hear* a case is identical in all respects with the jurisdiction *to order enforcement* of a judgment obtained without due process.

b. the controlling facts have changed

Since 2001, the controlling facts have also changed. As a result of *Bird,* the lack of due process at trial in the Blackfeet court is now an adjudicated fact. It is also a fact that the legal landscape has changed. The application of *Montana's* exceptions to the general rule that there is no tribal jurisdiction over non-Indians has been clarified in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.,* 128 S. Ct. 2709 (2008). *Plains* should now control the question whether a tribal court has the authority to *enforce* execution of this judgment on the reservation in the way the Respondents contemplate: "equipment, easements, rights of ways, and all other property owned and controlled by Glacier Electric Co-Op," App. 112a, as well as "payments on power bills or accounts

receivable of the Defendant, Glacier Electric, the judgment debtor [,] from the Glacier Electric payment office located within the boundaries of the Blackfeet Reservation and from customers within the Reservation who owe money to Defendant." App. 101a.

Not only logic, but the timing of these legal proceedings firmly divide the jurisdictional inquiries in *Bird* and *Sherburne*. No one could know when tribal subject matter jurisdiction was upheld in the tribal and federal district courts in *Bird* that ultimately, the Ninth Circuit would hold there was no due process, or that the Respondents would nonetheless petition the tribal court in *Sherburne* to assist in enforcing the judgment. Not only is the lack of due process now an adjudicated fact; it implicates due process as a *legal principle*. It is therefore a "controlling fact" that is "essential to a judgment." *Montana v. United States*, 440 U.S. 147, 159 (1979).

Under these circumstances, issue preclusion is neither warranted nor wise where "the factual and legal context in which the issues of this case arise has . . . materially altered" since 2001. *Id.* at 162. "'[Issue preclusion] is not meant to create vested rights in decisions that have become obsolete or erroneous with time[.]'" *Id.* at 161 (*quoting Sunnen*, 333 U.S. at 599).

2. The Decision on Issue Preclusion Contradicts this Court's and Ninth Circuit Precedent

Respondents insisted to the Ninth Circuit that GEC abandoned the issue of subject matter jurisdiction and that "[j]urisdiction is jurisdiction." The Ninth Circuit agreed, but its decision conflicts with its own and this Court's precedent: that issue preclusion "must be

confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts . . . remain unchanged." *Sunnen,* 333 U.S. at 599-600; *accord, Sasson v. Sokoloff,* 424 F.3d 864, 872 n.4 (9th Cir. 2005)("the issue sought to be precluded from relitigation must be *identical* to that decided in a former proceeding"); *Clements v. Airport Auth. of Washoe County,* 69 F.3d 321, 330 (9th Cir. 1995)("In issue preclusion, the only litigation barred is the *re*-litigation of an issue that has been *actually* litigated and *necessarily* decided.").

GEC cannot "abandon" an issue that has never seen the light of day: whether a tribal court has the authority to enforce a judgment that a federal appellate court has held was obtained without due process, and to do so within the exterior boundaries of a reservation against a non-tribal member and against non-Indian assets. "[W]here no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of [due process] so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000); *Headwaters Inc. v. United States Forest Serv.,* 399 F.3d 1047, 1055 (9th Cir. 2005)(*quoting Arizona*); *accord, California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 280-81 (9th Cir. 1974)(warning that *sua sponte* dismissals without an opportunity to be heard may further violate due process). In *Headwaters*, the Ninth Circuit observed that "[o]ur research failed to find a single case in which this court has upheld a dismissal for claim or issue preclusion where the parties were not given any opportunity to be heard on the issue." 399 F.3d at 1055 & n.6 (listing illustrative cases).

Here, the district court's *sua sponte* ruling "did not subject its res judicata decision to the rigors of the adversarial process." *Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1225 (9th Cir. 1990).

The district court could not determine *sua sponte* that tribal jurisdiction to grant and enforce a writ of execution on the judgment – the very one obtained without due process – was "res judicata" when that particular issue was never "*actually* litigated and *necessarily* decided." *Clements*, 69 F.3d at 330. The Ninth Circuit declined to decide this very issue of tribal court enforcement because the question was not before it. *Bird*, 255 F.3d at 1139 n.2. And Judge Hatfield did not consider whether there was due process in the Blackfeet trial when he ruled in 1998 that the tribal courts had jurisdiction. He did not consider whether there was due process in the Blackfeet trial until 1999 – and in *Bird*, the Ninth Circuit reversed Judge Hatfield on the very issue of due process.

The district court's 2009 dismissal of GEC's Complaint under these circumstances was itself a violation of due process, because that court plainly had not previously decided the issue of whether the defective tribal judgment could be enforced in the tribal court. *California Diversified*, 505 F.2d at 280-81.

3. The Traditional Reasons for Issue Preclusion Do Not Apply

The reasons for prohibiting parties from relitigating issues that were litigated are: "[t]o preclude parties from contesting matters that they

have had a full and fair opportunity to litigate, which protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana,* 440 U.S. at 153-54.

None of these reasons for preclusion applies. GEC has never had a full and *fair* opportunity to litigate *anywhere* whether Respondents may enforce the defective judgment against GEC within the exterior boundaries of the Blackfeet Reservation on utility rights-of-way and on non-Indian fee land, and with respect to *payments owed* from electrical service generated, transmitted, and administrated on non-Indian fee land, non-Indian property, and non-Indian utility rights-of-way. *See* App. 99a-101a. The Ninth Circuit did not reach this issue in 2001: "[b]ecause we have only the suit by Glacier Construction and its principals, to recognize and enforce the tribal court judgment, *we do not address . . . whether there may be further proceedings in the tribal court*." *Bird,* 255 F.3d at 1139 n.2 (emphasis added). This question was left open. If consideration of tribal authority to enforce the judgment is not precluded, then the Ninth Circuit must be reversed and this case remanded to federal district court for a reconsideration of the question under the current legal standards. If ultimately it is held that there is no tribal authority to enforce a fundamentally unfair judgment, then that is the end of the story for Respondents. If there is tribal jurisdiction, then the question becomes to what extent the federal courts may provide injunctive and declaratory relief over the assets Respondents want to execute upon on the reservation – GEC's land, buildings, and equipment on non-Indian fee land and

utility rights-of-way, as well as payments owed for the electricity that GEC has provided.

Respondents have denied the power of the federal courts to order injunctive and declaratory relief: "[t]he Federal Court does not have power or jurisdiction to prevent enforcement of the Judgment on the Reservation." App. 239a. But this Court decided in *Plains* that the federal courts *do* have such power when non-Indians are involved and non-Indian fee land is at stake, even where the *Montana* exceptions arguably apply. 128 S. Ct. at 2719-20. It has long been established that the question of whether a tribal court has authority over nonmembers is a federal question that is squarely within the jurisdiction of the federal courts to decide. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985). Further, it is a "settled principle" that "[i]f the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains,* 128 S.Ct. at 2717. Therefore, the federal courts should also have the power to declare a judgment against non-Indians null and void for lack of due process; to declare that the tribal courts have no authority to enforce a judgment obtained without due process against non-Indians on non-Indian fee land and other property not controlled by the tribe; and to enjoin Respondents from continuing their enforcement efforts in tribal court on any or all of those grounds. The district court here should not have paved the way with its "res judicata" ruling for enforcement of a fundamentally defective tribal judgment anywhere, including on non-Indian fee land and non-Indian property on the reservation:

> It has long been the law of the United States that a foreign judgment cannot be *enforced* if it was obtained in a manner that did not accord with the basics of due process. The guarantees of due process are vital to our system of democracy. We *demand* that foreign nations afford United States citizens due process of law before recognizing foreign judgments; *we must ask no less of Native American Tribes.*

Marchington, 127 F.3d at 811 (citation and quotation omitted)(emphasis added).

Finally, there is no vexatious or piecemeal litigation for Respondents in having to defend such an issue that has never been fairly litigated. There is no reason to conserve judicial resources or rely on previous judicial action when the issues this case presents are ones of first impression and need the considered judgment of the federal courts.

If the Blackfeet tribal courts pay lip service to due process for non-tribal members, and have the power to enforce this judgment that has been held to violate due process and fundamental fairness, then the "ingredients of 'civilized jurisprudence'" are missing. *See Bird,* 255 F.3d at 1143 (in comity analysis, comparing *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406 (9th Cir. 1995) ("The due process defects in the revolutionary Iranian courts were fundamental.")). Like the due process defects in the Iranian courts in *Bank Melli Iran*, the defect here in the Blackfeet tribal court was fundamental despite the fact that, unlike the Iranian courts, the Blackfeet have adopted Anglo-Saxon law and follow traditional notions of due process. The ultimate question is whether the federal

courts should defer to this result where the sovereignty of Indian Nations is "'unique and limited'" and centered "on the land held by the tribe and on tribal members within the reservation." *Plains,* 128 S. Ct. at 2718 (*quoting United States v. Wheeler,* 435 U.S. 313, 323 (1978)). But this is a question for another day, once the false barrier of issue preclusion is removed.

4. Special Circumstances Mitigate Against Issue Preclusion

a. due process with respect to trial of non-Indians in tribal courts is an area where doctrine should not be frozen

This Court has another caveat to the application of issue preclusion: "whether other special circumstances warrant an exception to the normal rules of preclusion." *Montana,* 440 U.S. at 155. The facts of this case present an excellent example of why this exception should apply.

This Court observes: "[u]nreflective invocation of [issue preclusion] against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Id.* at 163. This observation is especially pertinent where the "domestic dependent status of Indian nations is not well developed." *Bird,* 255 F.3d at 1141 &n.10 (*citing Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831)). And, Indian law "is one of the most active areas of law in the early twenty-first century." F. Cohen, *Handbook of Federal Indian Law* xii (2005 ed.). The Constitutional issue of due process as it relates to

non-Indians tried in tribal courts, and as it applies to *property* of non-Indians, is not an area where doctrine should be frozen by an erroneous application of issue preclusion.

Consequently, where due process was held to be lacking for a non-tribal member like GEC in the Blackfeet trial court, responsiveness on the part of federal courts is critical, for

> [t]he Bill of Rights does not apply to Indian tribes. Indian courts differ from traditional American courts in a number of significant respects. And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.

Plains, 128 S. Ct. at 2724 (internal quotations and citations omitted).

Here, GEC never consented to have its due process rights forfeited in the tribal courts, especially where "[t]he Blackfeet Judicial System [claimed to] possess a *deep and abiding concern for assuring due process and equal protection of law to all litigants.*" App. 136a

(emphasis added).[3] What is more, "Indian tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. Tribes retain only the powers of self-government, which "'involve *only the relations among members of a tribe.*'" *Id. (quoting Wheeler,* 435 U.S. at 326)(emphasis added in *Montana).* Enforcing a judgment against a non-Indian like GEC does not invoke the Blackfeet's retained power of self-government: "'The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe[.]*'" *Id. (quoting Wheeler,* 435 U.S. at 326 (emphasis added in *Montana*)). No control of internal relations in the Blackfeet tribe, such as tribal membership, domestic relations, or rules of inheritance, are involved here either. *Id.*

b. the Blackfeet Code conforms with the traditional notion of due process and there are no tribal interests requiring deference

One commentator has said that tribal codes such as the Blackfeet Tribal Law & Order Code are "unquestionably Anglo-American documents." Brakel, Samuel J., *American Indian Tribal Courts–The Costs of Separate Justice* 17 (1978). In 2001, quoting this

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[3] *See also Tall White Man v. Blackfeet Indian Housing Auth.*, No. 99-AP-37 (Blackfeet Ct. App. filed Apr. 4, 2007)("In order to prevent manifest injustice [the court's order] is hereby vacated"); *Brown v. Schlaht,* No. 95-CA-40 (Blackfeet Tribal Ct. filed Oct. 9, 1995)("the Court is also compelled to consider the fairness to all parties concerned under long-standing principles of justice embraced by the Blackfeet Code and Constitution"). These Blackfeet decisions are reprinted in Appendices X and Y.

commentator, the Ninth Circuit held that "[i]t follows that our conception of due process for these tribal courts should be similar to that for federal and state courts. . . . we see no reason to depart from traditional due process values requiring fundamental fairness." *Bird,* 255 F.3d at 1144 & n.13. The court stated it need not weigh any tribal interests where Blackfeet law is patterned after Anglo-Saxon law. Instead, "[w]here the rights are the same under either legal system, federal constitutional standards are employed[.]" *Id.* at 1143 (*quoting Randall v. Yakima Nation Tribal Court,* 841 F.2d 897, 900 (9th Cir. 1988)). The court looked to the Indian Civil Rights Act of 1968 ("ICRA"), which provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or *property* without due process of law[.]" 25 U.S.C. § 1302(8) (emphasis added). Because the only remedy for such a violation is habeas review, the Ninth Circuit used the ICRA only as an analogy. *Bird,* 255 F.3d at 1143 & n.12. The court acknowledged that Constitutional due process concerns were not meant to "'disrupt settled tribal customs and traditions.'" *Id.* at 1143 (*quoting* F. Cohen, *Handbook of Federal Indian Law* 670 (1982 ed.)). Nevertheless, the court refused to weigh any tribal concerns because the Blackfeet have adopted Anglo-Saxon law and procedures. *Id.* at 1143-44 & n.13.

One issue in *Bird* was GEC's failure to object–after being overruled on every single objection it raised during the trial – to the inflammatory closing argument. The Ninth Circuit dealt at length with this issue, holding with the majority of federal appellate courts that a fundamental error that goes to the very integrity of the trial may be reviewed for plain error

absent a contemporaneous objection. 255 F.3d at 1144-48. But at oral argument here, the panel seemed to believe that the Blackfeet *tribal courts* require such an objection under its *own* notions of due process and that "for us to go further to say the tribal court has no jurisdiction period, that's a pretty major step." Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). But nowhere, prior to this case, have the Blackfeet ever informed non-Indians being tried in their courts that this was their legal requirement, and no Blackfeet Code has so stated. The idea to invoke this newly created rule apparently came from the only federal appellate decision cited in *Bird,* 255 F.3d at 1147-48, where objection to closing argument in a civil case was waived if not made. *See Deppe v. Tripp,* 863 F.2d 1356 (7th Cir. 1988). But this Court warns: "nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Plains,* 128 S. Ct. at 2724. As a non-Indian, Petitioner could hardly consent to a tribal legal requirement that was unrevealed at that time.

"The due process clause explicitly protects not only liberty, but also property rights." *Bird,* 255 F.3d at 1148. This is precisely why the Ninth Circuit rejected the Seventh Circuit's decision in *Deppe,* which held that in *civil* litigation a failure to object to closing argument cannot invoke review for plain error because "[i]n civil cases where economic and property interests are usually at stake, as opposed to criminal cases where more substantial liberty interests are involved, a plain error doctrine is unneeded." *Deppe,* 863 F.2d

at 1364. In short, the Ninth Circuit recognized that property is no less important than liberty under the Fifth Amendment.

Finally,

> [b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep. No. 474, 23rd Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Oliphant v. The Suquamish Indian Tribe, 435 U.S. 191, 210 (1978). Is enforcement of *this* tribal judgment acceptable to Congress? Where a fundamental right such as due process is at stake, issue preclusion should not have the upper hand *even if it were applicable*. "Unreflective invocation of collateral estoppel [e.g., issue preclusion] with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana*, 440 U.S. at 163. And, due process is hardly unimportant. It is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951).

With such important concerns at stake, the "special circumstances" exception to issue preclusion should apply. "'Redetermination of issues is warranted *if* there is reason to doubt the . . . *fairness of procedures* followed in prior litigation.'" *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982)(*quoting Montana*, 440 U.S. at 164 n.11)(emphasis added). This should apply no less to litigation in tribal courts. Redetermination of whether there is tribal jurisdiction to enforce this judgment is even more warranted now, where there is not reason to doubt, but it is *beyond* doubt there was fundamental unfairness in the Blackfeet trial, *and* where the Blackfeet have adopted Anglo-Saxon law. Under these circumstances, unreflective invocation of issue preclusion is not justified where the issues of the initial jurisdiction over the dispute and the authority to enforce the relief awarded in the absence of due process are distinct. *Cf. Montana*, 440 U.S. at 163; *Avco Corp.*, 390 U.S. at 561.

c. seizure of GEC's property within the exterior boundaries of the Blackfeet reservation could have serious consequences for national security

There is yet another special circumstance that warrants an exception to issue preclusion, assuming *arguendo* such preclusion applies. This circumstance is of such import, it merits a separate discussion. On August 31, 2010, the Blackfeet Court of Appeals filed the "Order Granting Petition for Writ of Execution" which, in effect, "direct[ed] the tribal police or BIA to seize payments on power bills or accounts receivable of the Defendant, Glacier Electric, the judgment debtor from the Glacier Electric payment office located within the boundaries of the Blackfeet Reservation and from

customers within the Reservation who owe money to Defendant." App. 101a.

If the Blackfeet courts have, as they claim, the power to order the judgment satisfied by GEC's on-reservation assets – including payments from customers, non-Indian fee land, and non-Indian property and utility rights-of-way – and if, as Respondents claim, "[t]he Federal Court does not have power or jurisdiction to prevent enforcement of the Judgment on the Reservation," App. 239a, there are truly serious concerns for this Court. "Whether a tribal court has [such] authority over nonmembers is a federal question." *Plains,* 128 S.Ct. at 2716 (citing cases). Whether a tribal court has exceeded the limits of its jurisdiction, even with respect to the *Montana* exceptions, is a question federal courts have authority to determine, as a matter arising under federal law. *Strate v. A-1 Contractors,* 520 U.S. at 448, 449-459 (1997)(*citing Nat'l Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852-53 (1985)). This Court has "frequently noted" that the "'sovereignty that the Indian tribes retain is of a unique and *limited* character.'" *Plains,* 128 S.Ct. at 2718 (*quoting Wheeler,* 435 U.S. at 323) (emphasis added). "It centers on the land held by the tribe and on tribal members within the reservation." *Id.* "[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe." *Nevada v. Hicks,* 533 U.S. 353, 392 (2001)(O'Connor, J., concurring in part and concurring in judgment).

GEC supplies electricity to two ports of entry between the United States and Canada. Given the limited sovereignty of the Blackfeet Nation, this Court should take note of what is ultimately at stake in

Respondents' efforts to execute now upon payments due and other GEC assets in utility rights-of-way and on non-Indian fee land GEC owns. It is nothing less than "the Government's compelling interests in safety and in the integrity of our own borders." *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 672 (1989). The manager of GEC stated as much in his affidavit regarding GEC's request for injunctive and declaratory relief:

> GEC's use of such on-reservation assets is a necessary link for providing service to individuals and businesses off the reservation, including to both sides of two ports of entry on the U.S./Canadian border, and into Canada.
>
> (5) If the plaintiffs in *Bird v. Glacier Electric Cooperative, Inc.*, Blackfeet Tribal Cause No. 92CA-269 use the information demanded in their debtor exam to execute on and seize GEC assets within the exterior boundary of the Blackfeet Reservation, irreparable harm will result to persons and businesses outside the reservation. It is not possible to estimate the damages that would result from an interruption in electrical service to an unknown number of customers for an unknown period of interrupted service. Loss of electric service and maintenance assets would seriously undermine GEC's ability to provide service both on and off the reservation. This would, in turn, cause considerable harm to the ability of schools, hospitals, governmental entities and others to provide essential services both on and off the reservation, and would interrupt commerce both

> on and off the reservation as well, and into Canada.

App. 153a-154a.

One panel judge's response to this problem was to say: "well, what ordinarily happens, as we all know, [] if someone with a judgment threatens to execute on specific pieces of personal property, the *ordinary responsible defendant*, once the judgment is clearly capable of execution, they just *pay the money.*" Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). This is an extraordinary remark. Aside from the due process rights and values GEC has tried to protect for the past eight years for itself and all other non-Indian defendants in tribal courts, GEC is a very small electric cooperative. As the Respondents observed at oral argument, "80 percent of their customers are tribal members." Oral Argument, Ninth Circuit, Feb. 2, 2010 at http://www.ca9.uscourts.gov/ (Media Recordings, No. 09-35216). How GEC is to come up with the money to pay a judgment of $2,157,181.60, plus costs, with interest running at 7% per annum since 1993 in order to conform to someone's notion of a "responsible" defendant, or to have its payments seized by tribal police and/or the BIA for electrical services already provided, and at the same time supply electricity to tribal members and two ports of entry on our northern border with Canada without raising its rates for electricity considerably higher – or

be forced to shut down for lack of operating capital – is unanswered.[4]

CONCLUSION

This Court has said: "tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on *non-Indian land.*'" *Plains,* 128 S. Ct. at 2722 (*quoting Hicks,* 533 U.S. at 360)(emphasis added in *Plains).* Only last year in this seventeen-years-long litigation has it become apparent that Respondents, aided by the tribal courts, maintain that just such authority exists to enforce the judgment simply because some of GEC's assets, which Respondents want to seize and/or sell to satisfy the judgment, are within the exterior boundaries of the reservation. Only on August 31, 2010, did it become clear that the tribal courts are ordering that payments to GEC due and owing from customers, including non-tribal members, within the exterior boundaries of the Blackfeet reservation be seized. App. 99a-101a. Issue preclusion does not foreclose consideration of these recent facts or the fact of the due process violation, decided long after the

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[4] This Court may take judicial notice of the fact that Senators John Tester and Max Baucus of Montana and Secretary of Homeland Security Janet Napolitano held hearings in Havre, Montana on August 25, 2010, to address issues of Montana's border safety and integrity. App. 250a-252a. And in 2002 GEC warned, with respect to the requested writs of execution, that "any effort to seize the Co-op's assets could disrupt electrical service to thousands of individuals and businesses on the Blackfeet Indian Reservation, and adversely effect not only the economy, but the safety and welfare of the public as well." App. 229a.

federal district court determined there was tribal court subject matter jurisdiction over the original dispute.

This case is of enormous significance to this Nation and to the Indian tribes, numbering over 500, whose members are also citizens of the United States. This is the first time an Indian tribal court, knowing full well that its judgment was adjudicated to be unrecognizable and unenforceable in comity proceedings for a lack of fundamental due process, has nevertheless proceeded to enforce the judgment on its own, issuing numerous decrees that assert tribal authority over payments due and owing to GEC; over non-tribal members, non-Indian fee land, non-Indian property, and a non-tribal institution and its employees and agents not on the reservation, notwithstanding the fact that the tribal court has professed, even before the tribal trial took place, a "deep and abiding concern for assuring due process and equal protection of law to all litigants." App. 136a.

For all the reasons discussed, Petitioner respectfully requests that this Honorable Court grant the Writ.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-35216
D.C. No. CV-08-30-SEH

[Filed June 25, 2010]

GLACIER ELECTRIC COOPERATIVE, INC.;	)
Plaintiff-Appellant,	)
v.	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD, and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.;	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted February 2, 2010
Seattle, Washington

MEMORANDUM*

Before: W. FLETCHER and RAWLINSON, Circuit Judges, and MOSMAN,** District Judge.

Glacier Electric Cooperative ("GEC") appeals the district court's decision to grant summary judgment in favor of Appellees (collectively, "Glacier Construction"). At summary judgment, GEC argued that a tribal court judgment against GEC was void for lack of subject matter jurisdiction. In 1998, the issue of tribal subject matter jurisdiction was fully litigated in the district court during a different but related lawsuit between these same parties. Accordingly, the district court concluded that the doctrine of res judicata precluded GEC from relitigating the tribal court's subject matter jurisdiction in this proceeding.

Issue preclusion attached to the district court's 1998 decision. The issue of subject matter litigation was actually litigated in 1998, determined by a valid and final judgment on remand, and essential to judgment. *See, e.g.*, *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting Restatement (Second) of Judgments § 27, p. 250 (1982)); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Even though the appeal of this case was ultimately resolved

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Michael W. Mosman, District Judge for the District of Oregon, sitting by designation.

on grounds of due process, the determination of subject matter jurisdiction made by the district court was never disturbed. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("[T]he existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment.").

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NO. CV 08-30-GF-SEH

[Filed February 19, 2009]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
vs.	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,	)
Defendant.	)

ORDER

The Court held a hearing on cross motions for summary judgment on February 18, 2009. Upon the record made in open court and for reasons and upon conditions stated,

ORDERED:

1. Plaintiff's Motion for Summary Judgment[1] as requested is DENIED.

2. Defendant's Motion for Summary Judgment[2] as requested is GRANTED.

3. The clerk is directed to enter judgment accordingly.

DATED this 18th day of February, 2009.

/s/ Sam E. Haddon
SAM E. HADDON
United States District Judge

---

[1] Docket No. 18.

[2] Docket No. 7.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

Cause No. CV-08-30-GF-SEH

[Filed February 19, 2009]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
vs.	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,	)
Defendant.	)

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment as requested is DENIED.

2. Defendant's Motion for Summary Judgment as requested is GRANTED.

DATED this 19th day of February, 2009.

PATRICK E. DUFFY, CLERK

By: /s/ Suzanne Redding
Suzanne Redding, Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Civil Docket No. 08-30-GF-SEH

[Dated February 18, 2009]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
-vs-	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,	)
Defendants.	)

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

Heard in Courtroom Number 204
Federal Courthouse
215 First Avenue North
Great Falls, Montana

February 18, 2009
2 p.m.

BEFORE THE HONORABLE SAM E. HADDON
UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
215 First Avenue North - P.O. Box 1529
Great Falls, Montana 59403-1529

Proceedings recorded by mechanical stenography, transcript produced by computer.

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A P P E A R A N C E S :

PRESENT ON BEHALF OF THE PLAINTIFF, GLACIER ELECTRIC COOPERATIVE, INC.:

MR. PAUL R. HAFFEMAN and
MR. DENNIS J. TIGHE and
MR. MAXON R. DAVIS
Attorneys at Law
DAVIS, HATLEY, HAFFEMAN & TIGHE, PC
P.O. Box 2103
100 River Drive North
The Milwaukee Station, Third Floor
Great Falls, Montana 59401-2103

PRESENT ON BEHALF OF THE DEFENDANTS, THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,:

MR. GARY M. ZADICK
Attorney at Law
UGRIN ALEXANDER ZADICK & HIGGINS
No. 2 Railroad Square, Suite B
P.O. Box 1746
Great Falls, Montana 59403-1746

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The following proceedings were had:

THE COURT: Good afternoon, all.

Be seated, please.

Ms. Stewart, if you'll call the matter, please.

CLERK OF COURT: This court will now conduct a motion hearing in Civil 08-30-GF-SEH, Glacier Electric Cooperative, Inc., versus Sherburne, et al.

THE COURT: We have before the court today cross-motions for summary judgment filed in this case. The plaintiff seeks a motion for summary judgment, and I quote: "Declaring that the underlying tribal court judgment and associated enforcement orders are null and void, and enjoining defendants from pursuing further enforcement efforts relating to that judgment."

That's the substance of the plaintiff's request.

The substance of the defendants' request is for an order of this court, and I quote: "Dismissing the complaint for injunctive and declaratory relief on grounds, quote, 'to enjoin proceedings for enforcement

of underlying tribal judgment solely from assets of Glacier Electric Cooperative located within and on the Blackfeet reservation.'"

Now, I take it, counsel, from the state of the record and from the cross-motions and the supporting papers, that both sides agree that the record that's before the court is

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adequate to completely address both motions. And in addition, is adequate to allow this court to rule on the motions in the manner in which they are framed. That is, to state it differently, that we don't have any factual disputes that either side is aware of that would preclude summary judgment.

MR. ZADICK: That's correct, Your Honor.

MR. HAFFEMAN: That's correct, Your Honor.

THE COURT: All right.

Well then, what I would like to do, counsel, is proceed with argument. And I'm going to ask that it go forward in this way: I'm going to ask the plaintiffs to speak first. Then the defendant may respond to the plaintiff's arguments and move directly to the defendants' arguments in support of their position. And then the plaintiff will be entitled to respond to the defendants' arguments.

We'll proceed accordingly.

MR. HAFFEMAN: Thank you, Your Honor.

May it please the court.

As Your Honor pointed out, the issue before the court today is whether a tribal court has jurisdiction to -- over the underlying action against Glacier Electric and also whether the tribal court has the jurisdiction to issue enforcement orders at the request of the plaintiff which extend off the reservation into Cut Bank and direct the

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co-op's manager, and non-member manager, to collect records which are located off the reservation, bring them on, and make them available for the plaintiff to utilize in their enforcement efforts.

So the -- as you know, by reading the briefs and from your past experience, the issue of jurisdiction is a federal question. It has been since the mid-'80s, and the Montana versus the United States case has been the seminal case that determines whether tribal jurisdiction exists or not.

The general rule under Montana is that there is not tribal court jurisdiction over non-members of the tribe.

There are two very narrow exceptions to that rule. The consensual exception -- or the consensual relationship exception and the health and welfare exception.

Those exceptions have been the subject of extensive litigation over the years. And it is now firmly established that they are very narrow exceptions and only apply in the narrowest of circumstances.

In the numerous cases that have gone up on an appeal to the United States Supreme Court, in virtually every case, the U.S. Supreme Court has said that there is not tribal court jurisdiction over the non-members involved.

In the Montana case, the U.S. Supreme Court said that the Indian tribe involved in that case did not have the authority to regulate non-Indian fishing and hunting on

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reservation land owned in fee by non-members.

In the Brendale case, the court said that the Indian tribe did not have zoning authority as to fee lands owned by members in open areas, but they did have zoning authority over closed areas. That is, areas where non-members were not allowed.

In the South Dakota versus Bourland case, the U.S. Supreme Court said that there was no authority for the tribe to regulate hunting and fishing by non-members on a federal reservoir project.

In the Strate case, there was no authority for the Blackfeet -- or for the tribe to regulate -- or have jurisdiction over a traffic accident that occurred on a federal highway right-of-way.

In the Atkinson Trading Company, the tribe couldn't impose an occupancy fee tax on non-member guests on non-Indian fee land.

And in the most recent case, the Plains Commerce Bank case, they said that the tribal court did not have jurisdiction over a discrimination claim which challenged a non-Indian bank sale of non-Indian fee land.

Since the Strate case, a focus of a lot of the U.S. Supreme Court's decisions and the lower courts has been on the nature of the land involved in the case. And whereas in Strate, you were on a right-of-way, that was important to the

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court's determination that there was no tribal court jurisdiction.

In this case, the underlying claim against Glacier Electric relates to Glacier Construction's work on right-of-ways across the reservation, utility easement right-of-ways across the reservation and off the reservation.

So this case is very, very similar to the Strate case where the court focused so much on the nature of the land involved.

In fact, there is a Ninth Circuit case out of Montana. It's the Big Horn County Electric case, where the court said that utility -- right-of-way utility easements are the same as non-Indian lands, such as the right-of-way involved in the Strate decision.

So this case is very, very similar to Strate and the other cases which have focused on the utility nature of the land that's at issue in the case.

This case differs from virtually every case in that it involves actions by Indian -- or a tribal court to actually reach off the reservation and seek to impose responsibilities on persons and objects off the reservation.

Specifically, the tribal court, at the request of the plaintiffs, have asked Glacier Electric's non-member manager to come on to the Indian reservation in the Blackfeet Tribal Court and show up with assets -- asset lists and other

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documents which are held off the reservation.

The only case that I'm aware of that addresses tribal courts' efforts to extend off the reservation is the -- I believe it's an Eighth Circuit, Hornell Brewing case, where an Indian tribe sought to -- I believe that they sought to enjoin a brewing company from naming one of their beers in a manner that was viewed as offensive to the tribe involved.

This is a case which falls squarely within the general Montana rule that there is no tribal court jurisdiction. And this court has the authority not only to address the issue of tribal court jurisdiction, but to issue an order enjoining the plaintiff from continuing their enforcement efforts.

This is not a case where we are asking the court to issue an order enjoining the Blackfeet Tribe itself or the Blackfeet Tribal Court from doing anything.

There have been cases involving tribal jurisdiction where the tribal court has been made a party to the litigation. We didn't do that in this instance. We are simply asking the court to enjoin the plaintiffs from continuing their tribal court enforcement efforts on the basis that they have -- that the tribe itself has no authority to assist them in their enforcement efforts, because the judgment that's involved in this case is null and void because of a lack of due process.

It's sort of an unusual case because the validity of the

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judgment was once before this court many years ago when Judge Haddon -- or I'm sorry -- when Judge Hatfield was on the bench.

And in that case, the issue went up on appeal both as to -- or as to the issue of due process, and the Ninth Circuit in 2001, issued a decision saying that the judgment was fatally flawed because of a lack of due process in the tribal court proceedings. The issue of jurisdiction never got addressed by the Ninth Circuit in that earlier case.

So at that point in time, we thought the case was probably over and done with. But after the case was remanded and the judgment was entered in our -- in Glacier Electric's favor in federal court, the plaintiffs went -- or the defendants in this case, the plaintiffs in the tribal court, went back into tribal court and began their enforcement efforts all over again.

So the anomaly in this case is that what we're talking about is a multi-million dollar judgment, which the Ninth Circuit Court of Appeals has already said is flawed by due process. And the defendants in this action are continuing to try to enforce that judgment. And we're asking that those enforcement efforts be stopped at this point in time and the case be brought to a final rest.

Thank you, Judge.

THE COURT: All right.

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I think I understand your position. Mr. Zadick.

MR. ZADICK: Thank you, Your Honor.

May it please the court, counsel. My name is Gary Zadick, and I appear here on behalf of the defendants.

As the court is aware from the briefing, and as is conceded by my opponents here, Judge Hatfield ruled long ago that the tribal court had subject matter jurisdiction. Judge Hatfield went through the Montana analysis. He analyzed the Strate decision, which at that time was the most recent decision, and held that there was a consensual relationship. That there was subject matter jurisdiction. The tribal court had jurisdiction, as well, over the Glacier Cooperative.

Judge Hatfield's decision is at tab F of document 9 of our statement of undisputed facts.

My colleague, Mr. Haffeman, just stated that jurisdiction was not addressed at the Ninth Circuit. That is true. Jurisdiction was not addressed at the Ninth Circuit, because Glacier Cooperative withdrew the jurisdiction argument. And in the statement of undisputed facts I've included the excerpt from the brief of Glacier Cooperative at the Ninth Circuit, which is tab G, in which there is a footnote stating -- affirming that they are not challenging jurisdiction. And then at tab H of document 9, which is our statement of undisputed facts, is a letter from counsel for

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the co-op telling the Ninth Circuit that jurisdiction was -- that they had abandoned their jurisdictional argument.

And so the reason that the Ninth Circuit did not address jurisdiction is that the issue raised on appeal initially by the co-op was then abandoned.

It's our position that the issue of jurisdiction is laid to rest by Judge Hatfield's ruling. It's the law of the case. And the Cooperative is bound to it, having chosen to waive it on appeal.

The extent of the ruling by the Ninth Circuit, then, was as to comity. And the Ninth Circuit was very careful in stating that it did not render any decision on further proceedings in tribal court. And in fact, we've quoted in our brief, Your Honor, the Ninth Circuit states at page 1153 of the opinion, footnote 21, I'm quoting in part: "We hold only that the tribal court

judgment is not entitled to comity and may not be recognized and enforced in federal court."

And then at page 1139 of footnote 2, similar statement, and I'll quote in part: "We do not address the merits of Glacier Construction's claim, nor do we address whether there may be further proceedings in the tribal court."

And so the Ninth Circuit did not address whether further proceedings could go forward in tribal court. The issue of due process raised at the Ninth Circuit on which the Ninth Circuit held that they would not grant the ruling of comity,

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was never raised in the tribal court at the time of trial. There was no objection raised -- nor during the appeal to the tribal court of appeals. It was an issue raised for the first time in federal court.

It is our position that Judge Hatfield's analysis was correct, and it's still binding.

Now, moving on to our motion for summary judgment, it is our position, and these issues are tied together, Your Honor, that this court does not have jurisdiction to, in effect, direct the tribal court or the litigants of tribal court that they cannot enforce a tribal court judgment based on assets within and on the reservation.

The co-op has raised the issue that the judgment is too old. It's too old, and so the tribal court has lost jurisdiction.

A bit of procedural history, and this is laid out in the briefs: Judgment was entered in 1993. There was an appeal. Eventually, judgment upheld, and so a debtor exam was ordered August 26 of 2003. The motion for debtor exam was then appealed by the co-op to the Tribal Court of Appeals. The Tribal Court of Appeals ruled about four years later, March 13, 2007, and its decision is tab A of document 9, that the debtor's exam would go forward and its proffer. The Tribal Court of Appeals also commented that delay and estoppel was all -- those arguments would fail; that all the delay was

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caused by the co-op's appeals, the co-op's refusal to post a bond, and its refusal to follow the tribal code, which requires a judgment debtor to disclose in writing its property on the reservation, subject to execution, which the co-op continues to refuse to do.

Once the March 2007 order came down from the tribal court, the debtor's exam motion was renewed on August 8, 2007. The co-op appealed it again. The same issue. And so a motion to dismiss the appeal was filed in the Tribal Court of Appeals. And the Tribal Court of Appeals ruled April 7 2008, that these issues were previously decided and that the judgment is subject to enforcement; that delay was caused by the co-op. And so a debtor exam was set.

And at the time of the hearing, and the transcript is part of the statement of undisputed facts, the co-op refused to send a representative to testify.

Now, if a Tribal Court of Appeals does not have the authority to enforce through contempt or other measures its execution procedures under its tribal code, then its jurisdiction is, in effect, nullified.

The tribal court having jurisdiction over the co-op is certainly entitled to require a representative of the party to appear in court and testify as to assets within the reservation.

This issue, we believe, and we submit to the court in

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our briefing, is a matter solely for the tribal court. Enforcement of the judgment on the reservation, that it is the court of a sovereign nation, and the courts of one nation have been reluctant and hesitant, as we've set out in our briefing, to interfere with these internal matters, which this is.

Enforcement of the judgment is not a matter of jurisdiction at this point, Judge Hatfield having previously ruled that the tribal court had jurisdiction.

Thank you.

THE COURT: All right, counsel.

Anything further by way of response from the plaintiff or otherwise?

MR. HAFFEMAN: Yes, briefly, Your Honor. If I may, our jurisdictional argument in this case has nothing to do with the age of the judgment. It is an old

judgment. And we raised that issue in the tribal court, because there is a rule in tribal court that says that if a judgment is more than six years old, you can't try to continue to enforce it. We used that as a defense in the tribal court. And the tribal court said that it didn't matter that their law said there was a six-year provision, even though the plaintiffs didn't start for ten years, they were allowed to proceed with enforcement efforts anyway. That has nothing to do with the jurisdictional issue before the court at this time, however.

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The jurisdictional issue before this court is partly the same issue that Judge Hatfield addressed back in 1998, but that judgment -- or that ruling was appealed and the issue -- or the ruling was reversed on appeal.

Now, the reversal vacated Judge Hatfield's order in its entirety and entered judgment in favor of the co-op in that case. So the effect of that ruling being reversed was to treat it as though it had never been issued.

So the issue that -- or the ruling that Judge Hatfield addressed or issued back in 1998, it's as though that's not on the record anymore. And this court has every authority to renew its look at the issue of jurisdiction at this time.

We've cited authority after authority in our briefs explaining that the law of the case doctrine doesn't apply in this context. And that even if the law of the case did apply, the court would have the discretion to revisit the issue of jurisdiction for -- because it meets all of the elements of the discretionary authority to

review an issue that's been addressed earlier in the case.

Finally, it's important for the court to be aware that while part of the jurisdictional issue is the same now as it was ten years ago, another part is not. And that has to do with the tribal court's orders which seek to reach off the reservation and affect persons and documents which are off the reservation. And that's not something --

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THE COURT: Well, let me stop you there, counsel, because, frankly, my reading of the defendant's motion for summary judgment request and the statements that are made in support of that motion in the brief, it seems to this court, is an acknowledgment by the Estate of Sherburne, the plaintiffs in the tribal court, that they're not trying to enforce this tribal judgment off-reservation.

Is that right, Mr. Zadick?

MR. ZADICK: That's correct, Your Honor.

As we've stated, and we will stand by, our enforcement efforts would be solely as to assets located within the reservation.

THE COURT: All right.

Okay.

MR. HAFFEMAN: The problem with that, Your Honor, is that the orders which they've drafted and

persuaded the tribal court to issue, aren't limited to on-reservation assets. For example --

THE COURT: Well, I think I'm hearing a lawyer who's an officer of this court saying that's not a part of the position that's being asserted in this court.

MR. ZADICK: That's correct, Your Honor. And Mr. Haffeman is correct, when we asked for the debtor exam, we did ask for records from the home office, which I think is Cut Bank; but our intent and our representation to the court

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we stand by, is enforcement of the judgment will be solely from assets within the reservation.

THE COURT: All right.

Okay.

MR. HAFFEMAN: The orders that they have -- that they have gotten the tribal court to issue and that we're being directed to comply with, however, do state that they affect the co-op's general manager off the reservation and they're demanding that we collect records, including financial records and insurance information, all of which is located off the reservation.

So while they may be telling this court that they only want the general manager to come on the reservation and to bring with him business records located off the reservation that relate to on-reservation assets, that's not what the orders say, and that's not what they asked the tribal court to do.

One last matter I would like to bring up is the fact that what I didn't mention in my opening is that the parties to this case did have a forum enforcement -- or a selection of forum clause in the contract that they had between themselves, which stated that Montana law would apply and that the venue for any dispute between the parties would be in state court in Cut Bank not in Blackfeet Tribal Court in Browning.

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And that's another reason why it makes no sense that 16 years after this litigation began, we're still fighting over the issue of where any proper proceeding for dispute between the parties should have been venued. The plaintiff had the right to file suit against the co-op in state court in Browning and should have done so pursuant to their contract. They chose not to do so. And now they suffer the consequences of their action. And that is: They've got a judgment which is not enforceable either on or off the reservation, because of a lack of due process, or because of a lack of subject matter jurisdiction.

Thank you, judge.

THE COURT: All right.

Is there anything further that either party would like to put on the record before we move to addressing these issues?

MR. ZADICK: No, Your Honor.

MR. DAVIS: May I, Judge?

THE COURT: Certainly.

MR. DAVIS: Since I --

THE COURT: Someone said that President Eisenhower always listened to the last person who spoke before he made a decision. Maybe you fall into that role today.

MR. DAVIS: Well, the only point -- I beg to differ with the court and agree, obviously, with my partner,

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is when Mr. Zadick has indicated they only seek to enforce the judgment on the reservation, on property on the reservation, bringing the co-op's records located in Cut Bank, off the reservation, is a species of property. You may not perceive it as having any particular value, but the plaintiffs in the underlying case have sought to bring the co-op -- property of the co-op, be it simply books and records, on to the reservation. And that's something that I don't think the tribal court has the authority to do under any stretch of the imagination. And --

THE COURT: Well, what about that, Mr. Zadick? Counsel makes the point that you say you're not trying to enforce this judgment off the reservation; and they say not so, because really what the -- what has been requested through the tribal court is in fact and as a matter of fact, an effort to move this judgment off the reservation for enforcement purposes.

MR. ZADICK: Your Honor, and I disagree, the records we sought were assets located within the reservation. They refused to appear. But as I've stated to the court, there are substantial assets within the reservation. We don't need records -- it would have been nice to have a debtor exam --

THE COURT: Well, do I take it from that last comment that you are abandoning, as far as any representation

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to this court, that you're seeking records from off the reservation?

MR. ZADICK: Yes, sir. And if that wasn't clear earlier, you've stated it very clearly; and I concur.

THE COURT: All right.

Okay.

Anything further, counsel?

I don't mean to cut anyone off. I recognize that this is a matter of substantial consequence to both parties.

Anything further?

MR. ZADICK: No, Your Honor.

MR. HAFFEMAN: No, Your Honor.

THE COURT: All right.

Well then, let's address these issues, counsel.

The case history of this controversy, as all of you well know, is, from both a factual and a procedural standpoint, is extensive. And the records are themselves fully developed. And I take it, as I said earlier, and counsel appeared to agree, that the record history of this controversy isn't disputed. It is in fact memorialized in no less than two extensive opinions; one from Judge Hatfield, and one from the Ninth Circuit. Judge Hatfield's memorandum and order of January 1998 in Cause Number 96-22 Great Falls, and then the later opinion of the Ninth Circuit Court of Appeals in Bird versus Electric Co-Op, which is reported at 255 F.3d 1136, in

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2001.

And as I have pointed out before, the facts that are set out in those opinions are established. This court, frankly, considers itself bound by the record that is before it as memorialized in those opinions. The role of this court at this time is not to assume to challenge the wisdom or the process of reaching the factual findings or the legal conclusions that are of record. What I have the obligation to do is to take the record that exists and the facts that have been set forth in that record, and apply them to the issue that is before this court.

As a preliminary, it is my view that these facts are clear and explicit in what they say. And in the end, the conclusions that are to be drawn from those facts are dispositive of the issues that are before this court.

I'll commence this analysis with just a summary of what has occurred and what took place. And counsel, of course, are aware of all of this intimately.

The co-op at the start of this controversy was sued in tribal court up on the Blackfeet Reservation. The co-op appeared by what is characterized in, I believe Judge Hatfield's opinion, as a special appearance; and among other issues, the co-op raised a challenge to the jurisdiction of the tribal court to hear the case.

That challenge was denied by the tribal court. The case

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then went to trial. And the tribal court awarded a judgment following the jury's determination in that case.

Later, by way of separate action, the plaintiffs in the tribal court proceeding sought to obtain the assistance of this court, that is, the United States District Court for the District of Montana, in enforcing that judgment. And they did so through Cause 96-22 that was filed and was under Judge Hatfield's jurisdiction.

In that case, both parties moved for summary judgment after apparently some substantial pretrial proceedings.

Judge Hatfield took the matter under consideration and ultimately issued an extensive memorandum and order. And in that particular memorandum and order, he phrased on page 3 of the memorandum, the

question in the form of, and I quote: "Presently before the court are the parties' cross-motions for summary judgment pursuant to FRCiv period P period 656 regarding the propriety of the Blackfeet Tribal Court's exertion of subject matter jurisdiction over the underlying matter."

Later in that same paragraph, he went on to say the following: "Accordingly, the issue of whether the Blackfeet Tribal Court possessed jurisdiction over the underlying action is ripe for review before this court in the exercise of its federal question jurisdiction under 28 United States Code Section 1331, given the fact that all avenues of

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potential relief in the tribal court system have been exhausted by Glacier Electric with respect to its jurisdictional challenge."

He went on to conclude near the end of his opinion in what I will characterize as essentially the rule of the case in this language, and I quote: "Accordingly, the underlying tribal court action falls within the second Montana exception, given the fact that a sufficient tribal interest exists for the Blackfeet Tribal Court to exert, based upon the tribe's inherent sovereign power, subject matter jurisdiction over the underlying dispute."

And finally, at the conclusion of the opinion, the court states: "The court concludes the motion for summary judgment filed on behalf of Glacier Construction with respect to the subject matter jurisdiction of the Blackfeet Tribal Court be, and the

same hereby is, granted. The motion for summary judgment filed on behalf of Glacier Electric is hereby denied."

Counsel, of course, are well-acquainted with the proceedings that followed. I think you were most all involved in the appeal which ensued. There was an appeal to the Ninth Circuit. The Ninth Circuit ultimately issued its opinion in the matter July 10, 2001. It's reported at 255 F.3d 1136.

The issue of jurisdiction of the tribal court was itself

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addressed in the Ninth Circuit's opinion, particularly at footnote 7, which I quote: "The co-op also took the position that the judgment should not be recognized because the tribal court lacked jurisdiction over it and because of a, quote, 'absence of reciprocity between the tribal court and the federal courts,'" end of quote. "It has abandoned these positions on appeal."

The co-op has also moved in district court for summary judgment based on lack of personal jurisdiction but has abandoned that position on appeal.

The Ninth Circuit, after noting that statement of position by the co-op, went on to address the issue that it deemed before it on due process and comity grounds. And it is clear from a reading of that opinion, that the court made an extensive analysis. And while it is unrelated to the ruling in this matter, it does appear to this court that the grounds set forth by the Ninth Circuit for refusing to recognize the tribal court

judgment on comity grounds was legitimately and solidly reasoned.

In the Ninth Circuit's opinion, it says, among other things: "We hold that Glacier Construction's appeals of racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated due process owed the co-op."

It then went on to hold near the end of the opinion, and

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I quote again: "We reverse the judgment of the district court and remand with instructions that the district court enter judgment for the co-op, declining to recognize and enforce the tribal judgment."

And there the court notes footnote 21, which is also significant to the matter before the court today. And there the Ninth Circuit says, and I quote: "Had this case been tried in federal court, our ruling might permit consideration of the possibility of a remand for a new trial. But because the case was tried in tribal court, we hold only that the tribal court judgment is not entitled to comity and may not be recognized or enforced in federal courts -- in federal court."

And the reversal goes on to say that the district court is to enter judgment for the co-op, denying comity.

Now, it is important to the analysis of this matter that we stop where the circuit stopped and look at

what the circuit did; and more specifically, what the circuit did not do in that particular matter.

Clearly, and without question, the circuit ruled that the tribal court judgment was not entitled to comity and to recognition in federal court.

However, it is inescapable from the circuit's ruling that it did not set aside the tribal judgment. And more specifically to the issues that are before the court today,

[p.26]

it did not rule and it cannot be read into the opinion, in my view, that the Ninth Circuit held that the tribal court judgment was invalid for lack of jurisdiction, an issue which had been addressed in tribal court and decided adversely to the co-op, and which, to bring it to the very specifics, had been addressed directly by Judge Hatfield, and indeed, it was the core of Judge Hatfield's ruling that the tribal court, indeed, had jurisdiction to resolve the controversy that was before it.

That history brings this matter that's before this court squarely into focus. And I say that because the issue of tribal court jurisdiction, before this lawsuit, the lawsuit that is before the court today, was ever filed, the issue of tribal court jurisdiction had been raised in two separate courts, first in the tribal court where it was decided against the co-op; and then it was raised in Judge Hatfield's court, and it was decided against the co-op in that case, as well.

More particularly as it applies to the current circumstances, that issue of tribal court jurisdiction was clearly an issue that was raised, or at least could have been raised on appeal; but the Ninth Circuit's opinion is equally clear and unequivocal in its declaration that that issue of jurisdiction and whether or not the tribal court had jurisdiction and whether or not Judge Hatfield was right in

[p.27]

his conclusion that it did have jurisdiction, that issue was abandoned.

Now, there's no escaping that what the plaintiff today, the co-op, seeks to do in this court in this case is to revisit that issue and now have this court say that the tribal court lacked jurisdiction, and that the tribal court jurisdiction is void.

So that framing of the question brings us to the proposition of whether the decision of Judge Hatfield as it was rendered back in 1998 on this very topic, is subject to some sort of attack or setting aside.

We have done some extensive work on this particular problem as it has drawn itself into focus. And the proposition as the court sees it is this: Whether or not Judge Hatfield's decision is now subject to collateral attack.

To state it differently, but to apply essentially the same principle: Does the doctrine of res judicata preclude a collateral attack upon Judge Hatfield's decision?

If we turn back to what Judge Hatfield had before him and what he did in his ruling, it is, to the view of this court, inescapable that Judge Hatfield had jurisdiction over the parties and over the subject matter that was before him at that time.

His jurisdictional capacity to decide the question

[p.28]

before him is not subject to dispute at this point.

The issue that was presented to him, that is, whether or not the tribal court had jurisdiction, was certainly briefed and extensively analyzed and was decided by him, the core of it being, as we announced earlier, that he found that the tribal court had jurisdiction over the controversy.

And this record taken as a whole, allows but one conclusion to be drawn; and that is that this decision -- that decision, I should say, by Judge Hatfield, namely, that the tribal court had jurisdiction over the original controversy, has never been set aside.

So the question then becomes one of whether this court can itself go back and undertake an analysis that would, if warranted, permit that decision of Judge Hatfield to be set aside.

Now, I'm going to move now into some analysis of this question that neither party has raised in the briefs, although there has been some briefing on law of the case grounds, the court sees this, as I said a bit ago, as one of whether or not this is a decision -- Judge

Hatfield's decision, that is capable of being collaterally attacked.

The general proposition of law from which I start this analysis is one drawn from Moore's Federal Practice, Volume 12, Paragraph 60.44(1)(a). And I'll paraphrase. But there the general proposition is laid out that if a court has

[p.29]

jurisdiction over the subject matter of a case before it; and if it has jurisdiction over the parties, that's a second requirement; and third, if the parties are given due process in the matters that are conducted before the court, then the decision of that court, when rendered, cannot be said to be void, even if wrong. It may be said to be erroneous, but it may not be said to be void. And if it is not void, it is not subject to collateral attack.

Now, that's the general proposition.

It is a proposition that is well-seasoned in our jurisprudence. And I'll start some reference to the historical recognition of that proposition by a very old case from the United States Supreme Court, Cocke versus Halsey, it goes way back to the 1840s; but the proposition set forth there is as equally applicable today, because it's still recognized today, as it was at the time it was enunciated. And the proposition is summarized by the Supreme Court in this language: And the proposition is, and I quote: "That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper and is binding until it shall be

regularly reversed by a superior authority. And it cannot be affected, nor the rights of the parties dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit for doubt at this date and it has been

[p.30]

repeatedly and expressly recognized in this court as in cases of," and then there are a number of citations.

I conclude from that case and from a later opinion of the U.S. Supreme Court, Sherrer versus Sherrer, reported at 344 U.S. 343, 68 Supreme Court 1087, the court summarizes the development of the law up to that point for the rule that res judicata prevents collateral attack if certain criteria are met. And it does so in this language, and I quote: "Insofar as cases originating in the federal courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and which the parties were given full opportunity to litigate."

That is exactly the issue that was before Judge Hatfield and as it was before Judge Hatfield.

In a later case from the Ninth Circuit, a case decided at 761 F.2d 1411, Donovan versus Mazzola, the circuit addresses the issue of the opportunity to raise a jurisdictional issue on appeal and -- where it was not, and whether or not under those circumstances the jurisdictional issue could later be raised in a separate proceeding. And the court does so

with this language: "Even if the issue of jurisdiction was not argued to the Donovan-I panel," which

[p.31]

was an earlier ruling, "if the parties had the opportunity to litigate the question of jurisdiction," which was available in the appeal from Judge Hatfield to the Ninth Circuit in this controversy, and I continue on, "it may not be reopened in a collateral attack upon the previous judgment."

From those cases, I think we can only draw these conclusions:

Number one, that the decision of Judge Hatfield has not been regularly reversed by a superior authority, to borrow the language of the United States Supreme Court. In fact, that issue was presented to the Ninth Circuit in the appeal. And that is clear from the circuit's opinion. And it is also clear and unequivocal that the co-op chose for its own reasons, which are not for this court to comment upon or revisit, it chose to abandon that jurisdictional question.

That record, which is in the view of this court, not subject to any level of dispute as a matter of factual recitation, or the sequence of events or the positions of the parties, dictates but one ruling that this court could make, and that is that the plaintiff's motion for summary judgment, as requested, must be denied. And the defendants' motion for summary judgment, as requested, is to be granted.

Now, I want to make clear in stating those rulings that I take it to be clear and explicit from the Ninth Circuit's reasoning, if not from the specific language of the case

[p.32]

itself, that this court has absolutely no capacity to act in any way that would recognize or enforce the tribal court judgment in any manner whatsoever off the reservation.

Stated differently: It would do no good for any effort to be made to have this court address off -- or address a request for help from the tribal court or its participants for off-reservation activities.

And I take it to be clear from this record, as has been confirmed in argument here today, that the plaintiffs in the tribal court proceeding have committed themselves not to seek to enforce this tribal court judgment off-reservation in any manner whatsoever.

And while it is not necessary to this court's ruling today, I am confident that the tribal court, by reason of the circuit's analysis, does not have any recognizable capacity to attempt to enforce its judgment off-reservation.

I reach those conclusions, counsel, based upon the record that's before the court. I make no judgments whatsoever concerning choices of strategy or approach that were taken at any point in time. I make no comment upon whether or not this court agrees or disagrees with the original ruling on jurisdiction. But

it is a decided issue with an opportunity to have been appealed. That opportunity for appeal has gone by the board. The ruling remains of record. It is binding upon this court. It is res judicata.

[p.33]

It may not be collaterally attacked. And this matter is concluded.

Thank you, counsel. I appreciate your efforts.

We'll get out a short order that confirms the ruling of the court.

MR. ZADICK: Thank you.

(The proceedings in this matter were adjourned at 2:54 p.m.)

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C E R T I F I C A T E

STATE OF MONTANA)
: SS
County of Cascade)

I, TINA C. BRILZ, RPR, FCRR, Official Court Reporter and Notary Public of the State of Montana residing at Great Falls, Montana, do hereby certify as follows:

That the foregoing motion hearing was reported by me on February 18, 2009, at 2 p.m. in Courtroom

Number 204 in the United States Courthouse in Great Falls, Montana.

That the foregoing thirty-three (33) pages of typewritten material constitute a true and accurate transcription of my stenographic notes which were reduced to writing by means of computer-aided transcription.

I further certify that I am not an attorney nor counsel of any of the parties nor a relative or employee of any attorney or counsel connected with this action or otherwise interested in the event thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal on this 3rd day of March, 2009.

/s/ Tina C. Brilz
TINA C. BRILZ
REGISTERED PROFESSIONAL REPORTER
NOTARY PUBLIC for the State of
Montana residing at Great Falls,
Montana. My commission expires
October 11, 2011.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

No. 99-35162
D.C. No. CV-96-022-GF-PGH

[Filed July 10, 2001]

RON BIRD, individually and on behalf of Glacier Construction, Inc.; HERB GILHAM, individually and on behalf of Glacier Construction, Inc.; and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc.,

Plaintiffs-Counterdefendants-Appellees,

v.

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant-Counterclaimant-Appellant.

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding.

Argued and Submitted — Seattle, Washington
July 18, 2000

Before: REAVLEY[1], O'SCANNLAIN, and GOULD, Circuit Judges.

COUNSEL

Jeremiah C. Lynch (argued), Great Falls, Montana, for the plaintiffs-counterdefendants-appellees.

Paul R. Haffeman (argued), Tiffany B. Lonnevik, Davis, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana, for the defendant-counterclaimant -appellant.

Jonathan Hemenway Glazier, Arlington, VA, for amici National Rural Electric Cooperative Association and Montana Electric Cooperatives' Association.

Michael E. Webster, Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., Billings, MA, for amici Farmers Insurance Exchange, Truck Insurance Exchange, and Fire Insurance Exchange.

Charles E. McNiel, Garlington, Lohn & Robinson PLLP, Missoula, MA, for amicus Nationwide Mutual Fire Insurance Company.

OPINION

GOULD, Circuit Judge:

Glacier Electric Cooperative, Inc. ("the Co-op") appeals the district court's judgment declaring that a

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[1] The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

judgment for compensatory and punitive damages rendered in the Blackfeet Tribal Court ("tribal court") is recognizable and enforceable in federal court. We must decide whether a district court may give comity to a tribal court judgment, for purposes of recognition and enforcement, where the closing argument of the successful plaintiff in tribal court included numerous statements encouraging ethnic and racial bias of an all tribal member jury against a corporate defendant that was owned and controlled by persons who were not tribal members. We conclude that the district court erred in giving comity to recognize and enforce the tribal court judgment here because, in view of the closing argument, the tribal court proceedings offended due process.[2] We have jurisdiction under 28 U.S.C.

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[2] The Co-op challenges other aspects of the tribal court proceedings, in addition to the closing argument, in contending that the proceedings violated due process. The other contentions of due process violations include: (1) an alleged restriction of Blackfeet jury service to members of the Blackfeet Tribe; (2) an alleged conflict of interest of the tribal court judge arising out of his financial relationship with the Co-op; (3) an alleged lack of formal legal training of the tribal court trial and appellate judges; (4) challenged ex parte contacts among the jurors, witnesses, parties, and counsel; (5) the decision of the tribal court judge to allow the jury to go on a site visit to the Co-op's on and off-reservation facilities; (6) the admission at trial of allegedly irrelevant, incompetent, and unfairly prejudicial opinion testimony from several lay witnesses of the Co-op who asserted that the Co-op had bias against Indians; (7) alleged defective service of process on the Co-op; (8) alleged conflict of interest arising from multiple roles assumed by an attorney in the Blackfeet tribal court system; and (9) alleged systemic deficiencies in the Blackfeet tribal court system. Because we conclude that the closing argument violated due process, precluding comity for the tribal court judgment, we need not and do not address these other issues.

§ 1291, and we reverse the judgment of the district court.

FACTS & PROCEDURAL BACKGROUND

Appellees Ron Bird and Herb Gilham are enrolled members of the Blackfeet Tribe. In 1991, Bird and Gilham, along with Appellee Scott Sherburne, purchased Glacier Construction, Inc., a Montana corporation located in the town of Browning, on the Blackfeet Reservation.[3] Most of Glacier Construction's business then consisted of work for the Co-op: replacing power poles, installing electric service to houses, and performing other maintenance. The Co-op is a Montana corporation headquartered in Cut Bank, Montana, outside of the Blackfeet Reservation.

In the fifteen months after Bird, Gilham, and Sherburne's purchase of Glacier Construction, their relationship with the Co-op deteriorated. The Co-op gave Glacier Construction less construction and maintenance work, while increasing the work it gave to a non-Indian-owned construction company.[4] In June

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Because we have only the suit by Glacier Construction and its principals to recognize and enforce the tribal court judgment, we do not address the merits of Glacier Construction's claim, nor do we address whether there may be further proceedings in the tribal court.

[3] For ease of reference we refer to Appellees collectively as "Glacier Construction."

[4] In this opinion, we refer to "Indians" to mean "Native Americans" because the terms "Indian" and "Indians" are generally used throughout the testimony, arguments, and

1992, the Co-op informed Glacier Construction that it was canceling all agreements and contracts with Glacier Construction, and that Glacier Construction could expect no further work from the Co-op. The Co-op's purported reasons included concerns about the quality and expense of Glacier Construction's work, liability exposure from Glacier Construction's alleged use of unqualified employees, and the Co-op's financial condition.

Bird, Gilham, and Sherburne filed suit against the Co-op in the tribal court. They alleged that, before purchasing Glacier Construction, they had received assurances that the Co-op would "continue to do work with [Glacier Construction] to maintain its power grid." They contended that they purchased Glacier Construction in reliance on those assurances. Their complaint asserted claims for negligent misrepresentation, constructive fraud, and breach of contract (arising from alleged breach of assurances), defamation (based on allegations that the Co-op had published a false criticism of Glacier Construction's work performance), and violation of tribal employment preference ordinances enforced by the Blackfeet Tribal Employment Rights Office ("T.E.R.O.")[5] (based on the Co-op's alleged failure to comply with bidding and hiring requirements preferential to tribal members and the abandonment of Glacier Construction for a non-Indian-owned construction company).

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proceedings in the tribal court system, the United States District Court, and the briefing.

[5] In the record, the parties and the tribal court consistently refer to this claim as the "T.E.R.O." claim. For ease of reference, we follow their convention.

The case was tried to a jury composed entirely of members of the Blackfeet Tribe. Glacier Construction's counsel argued during the trial that the Co-op ended its relationship with Glacier Construction not because of work quality, costs, and performance, but because the Co-op did not want to deal with an Indian-owned business and refused to give preference to tribal employment. The trial throughout had racial overtones that culminated a closing argument by Glacier Construction that repeatedly appealed to racial and ethnic prejudice. Glacier Construction's closing argument included mention of General Custer, analogies to "killing" and "massacre" of Indians, contrasts between "white man's magic" and the "lowly" Indians, references to the cavalry riding into town to kill an Indian business, and comment about the lands of the Indian people being taken by the "conquering people." The Co-op did not object to this argument, nor did it request any curative instruction or move for a new trial before the jury reached its decision.

The jury returned a verdict in favor of Glacier Construction on all claims, awarding $1,382,181.60 in compensatory damages and $775,000 in punitive damages.

The Co-op appealed to the Blackfeet Tribal Court of Appeals ("tribal court of appeals"). That court held that there is no private cause of action for damages under the T.E.R.O. and that the trial court had erred in allowing that portion of the case to proceed. However, the tribal court of appeals affirmed the

judgment, including all damages, in other relevant respects.[6]

Bird, Gilham, and Sherburne, individually and on behalf of Glacier Construction, filed this action in the United States District Court for the District of Montana, asking the court to "recognize, enforce and register" the judgment of the tribal court, "so that execution may be issued thereon in the federal court system." The Co-op answered that the judgment should not be recognized because, among other things, the Co-op was not afforded due process in the tribal court proceedings.[7] Subsequently, the district court granted Appellees' motion for summary judgment, and this appeal followed.

DISCUSSION

I

Because the decision to recognize a foreign judgment is discretionary, not mandatory, *see Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895), some federal courts of appeals have concluded that a district court's

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[6] The tribal court of appeals did not require any further hearing regarding whether the compensatory and punitive damages awards should have been reduced or vacated in view of its reversal of the T.E.R.O. claim.

[7] The Co-op also took the position that the judgment should not be recognized because the tribal court lacked personal jurisdiction over it, and because of an "absence of reciprocity between the tribal court and the federal courts." It has abandoned these positions on appeal. The Co-op also moved in district court for summary judgment based on lack of personal jurisdiction, but has abandoned that position on appeal.

decision to recognize a foreign judgment should be reviewed for abuse of discretion. *See Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir.1999); *Remington Rand Corp. - Delaware v. Business Sys. Inc.*, 830 F.2d 1260, 1266 (3d Cir.1987). However, we review de novo claims of due process violations. *See Hilao v. Estate of Marcos,* 103 F.3d 767, 780 (9th Cir.1996). If the tribal court violated due process, then the district court here had no discretion to recognize the tribal court judgment. *See Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). Further, de novo review is required when reviewing a district court's summary judgment. *See Botosan v. Paul McNally Realty,* 216 F.3d 827, 830 (9th Cir. 2000). For these reasons, we review de novo whether the alleged due process violations precluded the district court's grant of comity here to the tribal court judgment.

[1] The Co-op argues that it was denied due process in the tribal court and that the district court should not have given comity to recognize and enforce the tribal court judgment. This contention must be analyzed in light of principles of comity.

In *Marchington,* we held that principles of comity control whether a district court should recognize and enforce a tribal court judgment. *Marchington,* 127 F.3d at 807. We said that "as a general principle, federal courts should recognize and enforce tribal judgments." *Id.* at 810. Although we are bound by the Supreme Court's declarations of general principles of comity,[8]

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[8] In *Hilton,* the Supreme Court recognized:

we said that "special considerations arising out of existing Indian law merit some modification in the application of comity to tribal judgments." *Id.* As pertinent here, we held comity is precluded and "federal courts must neither recognize nor enforce tribal judgments if . . . the defendant was not afforded due process of law." *Id.*[9]

In *Marchington,* we described due process for the purpose of comity analysis:

> Due process, as that term is employed in comity, encompasses most of the *Hilton* factors,

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> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

159 U.S. at 202-03.

[9] The sole ground asserted by the Co-op in support of denying comity is that the tribal court proceedings violated due process. We have no need to consider in this case whether equitable considerations short of a denial of due process would preclude a federal court from giving comity to the tribal court judgment. *See Marchington,* 127 F.3d at 810.

> namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, as the Restatement (Third) [of Foreign Relations Law of the United States] noted, evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition." Restatement (Third) § 482 cmt. b.

Id. at 811.

While principles of comity take into account differences in the judicial systems of foreign nations, the comity analysis appropriate for the "domestic dependent nation"[10] status of Indian nations is not well developed. In *Marchington,* we wrote that federal courts must respect the "special customs and practical limitations" of tribal courts:

> Comity does not require that a tribe utilize judicial procedures identical to those used in the

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[10] The Supreme Court has long described Indian nations as "domestic dependent nations." This phrase was introduced by Chief Justice Marshall in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831).

> United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure. Indeed, *Hilton* rejected challenges to a judgment based on lack of adequate cross-examination and unsworn testimony. Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.

Id. (internal quotation marks and citations omitted).[11]

Further, we have recognized that "development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged." *Montana v. Gilham,* 133 F.3d 1133, 1140 (9th Cir. 1998). *See also Stock West Corp. v. Taylor,* 942 F.2d 655, 659 (9th Cir. 1991). As the Supreme Court has previously explained, "[t]ribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14-15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) (internal citation omitted). The importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity in

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[11] Although *Marchington* describes a due process analysis appropriate for tribal courts, that case was decided on jurisdictional, not due process, grounds.

any case where we have discretion to recognize and enforce a tribal court judgment.

Nevertheless, our precedents make clear that a district court cannot properly give comity to a tribal court judgment if the tribal court proceedings violated due process. We must decide whether the tribal court procedures in this case violated due process so as to preclude comity.

Weighing an alleged due process violation in English courts, we have held that "unless a foreign country's judgments are the result of outrageous departures from our notions of 'civilized jurisprudence,' comity should not be refused." *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (quoting *Hilton*, 159 U.S. at 205, 16 S.Ct. 139). The procedure in question in *British Midland Airways* was "the forerunner of our summary judgment rule" and we concluded that the "English procedure comports with our standards of due process." *Id.* (internal quotation marks and citations omitted). Our holding in *British Midland Airways* makes clear both that we must assess due process given in a foreign nation and that a foreign court's procedures need not be identical to our procedures to permit a grant of comity.

Similarly, in *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995), we also analyzed the foreign tribunal for deviations from "basic principles of due process" and "civilized jurisprudence." *Id.* at 1413. The due process defects in the revolutionary Iranian courts were fundamental.

> The evidence in this case indicated that [the defendant] could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf. Those are not mere niceties of American jurisprudence. They are ingredients of "civilized jurisprudence." They are ingredients of basic due process.

Id. (citations omitted).

The Co-op argues that because the Blackfeet tribal and appellate courts follow procedures based on and parallel to procedures used in state and federal courts, a comity analysis should hold the tribal court to a due process standard similar to that commonly employed by the federal courts.

In *Randall v. Yakima Nation Tribal Court,* 841 F.2d 897 (9th Cir. 1988), petitioner, a member of the Yakima Indian Nation, sought habeas relief arguing that the tribal appellate court violated his due process rights under the Indian Civil Rights Act ("ICRA"), when his appeal was dismissed as a result of the tribal trial court failing to timely rule on his *in forma pauperis* motion. ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due

process of law. . . ." 25 U.S.C. § 1302(8).[12] We concluded:

> In reviewing tribal court procedures to determine if they comport with this due process guarantee, "courts . . . [have] correctly sensed that Congress did not intend that the . . . due process principles of the Constitution disrupt settled tribal customs and traditions." F. Cohen, *Handbook of Federal Indian Law* 670 (1982 ed.) (footnote omitted); *see Tom v. Sutton,* 533 F.2d 1101, 1104 n. 5 (9th Cir.1976) ("courts have been careful to construe the term [ ] 'due process' . . . with due regard for the historical, governmental and cultural values of an Indian tribe"). Thus, defining the limits of due process protection under the Act "is not an easy process, because . . . [due process] concepts are not readily separated from their attendant cultural baggage; due process especially implies a number of particular procedural rights derived from Anglo-American history." F. Cohen, *supra,* at 670 (footnote omitted).

Id. at 900 (alterations in original). To conduct a due process review with deference to tribal customs and practices, we set this test:

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[12] We look to ICRA by analogy, for the only federal remedy provided is through habeas review of the legality of detention by an Indian tribe's order. *See* 25 U.S.C. § 1303; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 69-72, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). ICRA's protections are available to non-Indians subject to jurisdiction of tribal governments. *See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 196 n. 6, 98 S.Ct. 1011, 55 L.Ed.2d 209.

> Where the tribal court procedures under scrutiny differ significantly from those "commonly employed in Anglo-Saxon society," courts weigh "the individual right to fair treatment against the magnitude of the tribal interest [in employing those procedures]" to determine whether the procedures pass muster under the Act. *Where the tribal court procedures parallel those found "in Anglo-Saxon society," however, courts need not engage in this complex weighing of interests. Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act.*

Id. (internal citations omitted) (emphasis added). *Randall* supports that in a comity analysis concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials and appeals track those of our federal courts.

[2] Here, the procedures in the Blackfeet tribal court system are similar to those of Anglo-Saxon law. The Blackfeet Tribal Law and Order Code of 1967 ("Blackfeet Code") by its express provisions establishes civil procedures for pretrial, trial, and appeal very similar to our federal court procedures.[13] Glacier Construction acknowledges in briefing that "the civil

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[13] One commentator has said that tribal codes such as the Blackfeet Code are "unquestionably Anglo-American documents." Brakel, Samuel J., *American Indian Tribal Courts-The Costs of Separate Justice* 17 (1978).

procedures of the Blackfeet Tribal Court at issue are patterned after the procedures of Anglo-Saxon society." Glacier Construction invokes the power of the federal courts by requesting that in comity the federal courts should recognize and enforce the tribal court judgment here arising from a tribal court system with express rules and procedures based on Anglo-Saxon law. It follows that our conception of due process for these tribal courts should be similar to that for federal and state courts. For purposes of our comity analysis in this case we see no reason to depart from traditional due process values requiring fundamental fairness.

II

We now address whether Glacier Construction's closing argument violated due process.[14]

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[14] In district court, the Co-op asserted generally that tribal court proceedings and evidentiary rulings offended due process, and its due process challenge to closing argument can be viewed as subsumed in its broader allegation. The Co-op's opening brief on appeal to us did challenge due process in the tribal court proceeding, consistent with the arguments urged in the district court, but the Co-op only raised specifically the challenge to Glacier Construction's closing argument in its reply brief. We will not ordinarily consider an issue in the reply not argued in the opening brief. *United States v. Garcia*, 149 F.3d 1008, 1010 (9th Cir.1998). However, we have discretion to consider issues not raised by a party when the issue is one concerning jurisdiction, federalism, or comity that the court could raise *sua sponte*. *See Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993). In addition, both parties had an opportunity to discuss the issues concerning closing argument in supplemental briefing. These considerations, and the importance of the issue for fundamental fairness, lead us to consider whether Glacier Construction's closing argument violated due process.

To assess the Co-op's due process challenge to Glacier Construction's closing argument requires us to address two issues: (1) Does the Co-op's failure to object to Glacier Construction's closing argument or to move for a new trial on such grounds preclude our review of the closing argument's appeal to racial, ethnic, and national prejudice? (2) If our review is not precluded, did the appeal to prejudice violate due process, thereby barring comity for the recognition and enforcement of the tribal court judgment?

We have applied the plain error doctrine to civil trial court evidentiary rulings that were not objected to in a civil trial.[15] In *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010 (9th Cir. 1999), we applied the plain error standard to admission of hearsay evidence in a civil case "under which we consider[ed] whether the asserted error was highly prejudicial and affected

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[15] Federal Rule of Evidence 103(d) provides that "[n]othing in this rule [requiring an objection] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." However, apart from this rule of evidence, there is no express civil rule of procedure governing the application of "plain error."

In contrast, Federal Rule of Criminal Procedure 52(b) specifically calls for plain error review in criminal case and establishes the scope of plain error review. For an appellate court to correct an error not raised at trial pursuant to Rule 52(b), "there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (internal quotation marks and citations omitted).

Beachy's substantial rights." *Id.* at 1016. Similarly, in *McClaran v. Plastic Industries, Inc.*, 97 F.3d 347 (9th Cir. 1996), we applied the plain error standard to an evidentiary ruling where counsel failed to object to the admission of improper testimony under the parol evidence rule. *Id.* at 357 n. 9.

Our precedent does not clearly explain how plain error review is to be applied when reviewing closing arguments in civil cases. However, our decision in *Kaiser Steel Corp. v. Frank Coluccio Construction, Co.*, 785 F.2d 656 (9th Cir. 1986), is instructive. There, the defendant challenged alleged inflammatory statements made by plaintiff's counsel during summation. We noted that the defendant failed to object until after judgment was entered, had not explained its failure to object, and failed to demonstrate that the challenged comments were as egregious as those successfully challenged in other cases. We explained: "Some of the remarks by [plaintiff's] attorney were immoderate. Others appear to be either *de minimis* infractions or comments susceptible of more than one meaning. In any event, we find nothing in the record that stands out as fundamental error." *Id.* at 658. Although we did not grant relief, *Kaiser Steel* suggests that relief would have been granted for "fundamental error," though it provides no definition of what constitutes fundamental error.

Further guidance is found in *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283 (9th Cir. 1984). There, on appeal the defendant challenged a district court decision denying its motion for a new trial following plaintiff's jury verdict. The appeal was based on alleged prejudicial acts and misconduct of plaintiff's counsel, including comments in opening

statement and closing argument. The defendant argued that counsel's comments indulged in criminal imagery, commented on financial disparity between parties, dwelled on irrelevant subjects, and were otherwise improper. In declining to reverse for abuse of discretion, we noted, as one factor among others, that defendant's counsel "never objected during the closing argument or moved for a mistrial." *Id.* at 1286.

In *Kehr,* we did not treat a failure to object as a bar to review. Although we declined to grant relief, we assessed whether the improper remarks to the jury had caused sufficient prejudice to warrant a new trial. *Id.* We made clear that the attorney misconduct there did not so permeate the trial as to show that the jury was "necessarily prejudiced."[16] *Id.; see also Cooper v. Firestone Tire & Rubber Co.,* 945 F.2d 1103, 1107-08 (9th Cir. 1991).

Because our precedent is inconclusive, we consider how other federal circuit courts have addressed assertions of error in closing argument or other civil case procedures absent an objection.

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[16] *Kehr*'s discussion relies in part on *Standard Oil Co. v. Perkins,* 347 F.2d 379, 388 (9th Cir. 1965), in which we declined to give relief for attorney misconduct where the misconduct did not "sufficiently permeate an entire proceeding to provide a conviction that the jury was influenced by passion and prejudice in reaching its verdict." For conduct to "permeate" a proceeding it need not occur throughout the proceeding. Were that the case, the most blatant, unjustified, and prejudicial misconduct in closing argument would never warrant reversal because it would have occurred only at the end of a trial.

The D.C. Circuit has endorsed appellate review for "fundamental error" in civil cases where no objection was made. *Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F.2d 13, 15 (D.C. Cir. 1944). The court explained that "[t]here is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved, and our Rule 17(i), which states the principle, makes no distinction between civil and criminal actions." *Id.*

The First Circuit will review closing arguments for plain error in civil cases. In *U.S.I. Properties Corp. v. M.D. Construction Co., Inc.*, 860 F.2d 1 (1st Cir. 1988), the court considered an appellant's request for reversal based on a closing argument challenging the veracity of appellant's witnesses and using words like "corrupt," "conspirators," "lies," and "prevarications." Appellant had not objected, but the First Circuit found it appropriate to "review the court's decision to allow the statements under the 'plain error' standard." *Id.* As explained in a subsequent decision, "[t]he overwhelming weight of authority supports the rule that, when no timely objection is made, claims of improper closing argument are forfeited, not waived, and thus amenable to review for plain error." *Smith v. Kmart Corp.*, 177 F.3d 19, 25 (1st Cir. 1999). The First Circuit's test for plain error requires an exceptional case: "Under plain error review, we will consider a forfeited objection only if: (1) an error was committed; (2) the error was 'plain' (i.e. obvious and clear under current law); (3) the error was prejudicial (i.e. affected substantial rights); and (4) review is needed to prevent a miscarriage of justice." *Id.* at 26.

The Second Circuit has described "fundamental error" as "an error so serious and flagrant that it goes

to the very integrity of the trial," and has made clear that, when there is no objection to trial procedures, an appeals court will review for fundamental error. *Modave v. Long Island Jewish Medical Ctr.*, 501 F.2d 1065, 1072 (2d Cir. 1974).[17] In *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir. 1998), the court applied this principle in the context of reviewing a closing argument to which no objection had been made. Though denying relief on the facts, the court held that such argument was to be reviewed for "plain error" that went to the "integrity of the trial." *Id.*

The Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371, 1377 (3d Cir. 1993), has concluded that a defendant's failure to object to closing argument waives "its challenge to these statements on appeal." However, the court quoted an Eleventh Circuit case, *Woods v. Burlington Northern Railroad*, 768 F.2d 1287, 1292 (11th Cir. 1985) (per curiam), for the proposition that when a party fails to object to an improper closing argument in a civil case, an appellate court reviews for plain error. *Dunn*, 1 F.3d at 1377. *See also McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960).

The Fourth Circuit in *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989), considered the "fundamental error doctrine." It held: "Under this doctrine the court will consider issues raised for the

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[17] In reaching this conclusion, the Second Circuit cited *U.S. v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936), which recognized that under exceptional circumstances an appellate court should review errors to which no objection has been made if the errors were obvious or otherwise seriously affected fairness, integrity, or public reputation of judicial proceedings.

first time on appeal 'if the error is "plain" and if our refusal to consider such would result in the denial of fundamental justice.' However, such error must be so serious and flagrant that it goes to the very integrity of the trial." *Id.* (quoting *Stewart v. Hall,* 770 F.2d 1267, 1271 (4th Cir. 1985)).

The Fifth Circuit has also recognized plain error, and has granted relief for plain error made in closing argument absent an objection. *See Rojas v. Richardson,* 703 F.2d 186, 190 (5th Cir. 1983). There, in an action by an employee against an employer for personal injuries, the court held that the reference in closing argument to plaintiff's status as an illegal alien, not supported by the record and irrelevant to the negligence claims, was prejudicial to plaintiff and constituted plain error. *Id.* In attempting to assess plain error, the court perceptively commented on the difficulties of defining plain error, concluding that plain error must be determined by the facts of each case:

> The plain error rule is not a run-of-the-mill remedy. It is invoked only in exceptional circumstances to avoid a miscarriage of justice. The exact delineation of plain error is difficult to articulate. We have defined plain error as error which is both obvious and substantial. But such elegant phraseology yields little guidance. The determination still rests ultimately on the facts of each case.

Id. (internal quotation marks and citations omitted). *See also Edwards v. Sears, Roebuck & Co.,* 512 F.2d 276, 286 (5th Cir. 1975) (absent objection, the court granted relief holding that "the error in final argument

was of such magnitude . . . as to have seriously prejudiced defendants' right to a fair trial. . . ."). In *Edwards,* the court explained:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id.

The Eighth Circuit permits plain error review of closing argument. *See Thomure v. Truck Ins. Exch.,* 781 F.2d 141, 143 (8th Cir. 1986); *see also Whitehead v. Food Max of Miss. Inc.,* 163 F.3d 265, 278 (1998) (granting relief for improper closing argument, in part based on plain error); *Pavlik v. Cargill, Inc.,* 9 F.3d 710, 715 (8th Cir. 1993). In *Thomure,* the court held that "[w]hen statements in a closing argument are not objected to at trial, we may only review them on a plain error standard. We may reverse only in extraordinary situations, if the error is so prejudicial as to cause a miscarriage of justice." 781 F.2d at 143 (internal citation omitted).

The Eleventh Circuit in *Oxford Furniture Cos., Inc. v. Drexel Heritage Furnishings, Inc.,* 984 F.2d 1118 (11th Cir. 1993), explained its plain error rule:

> Our general rule is that a timely objection is necessary to bring to the district court's attention errors in counsel's arguments. When no objections are raised, we review the arguments for plain error, but a finding of plain error is seldom justified in reviewing argument of counsel in a civil case. Nevertheless, when the interests of substantial justice are at stake, we may order a new trial.

Id. at 1128 (internal quotation marks and citations omitted).

Against all the above circuits that recognize plain or fundamental error in civil cases, the Seventh Circuit stands alone for contrary authority, providing an apparently strict bar to appellate review of an alleged error in argument absent objection. *See Deppe v. Tripp,* 863 F.2d 1356 (7th Cir. 1988). That case involved a suit by investors against promoters alleging securities fraud, RICO violations and other claims. Plaintiffs lost at trial. On appeal, the Seventh Circuit rejected a challenge to defendants' closing argument absent contemporaneous objection, holding that failure to object or move for a mistrial in a civil case waives any right to challenge an improper closing argument. *Id.* at 1364-65. The court distinguished civil cases involving economic and property interests from criminal cases where liberty interests were involved, reasoning: "In civil cases where economic and property interests are usually at stake, as opposed to criminal cases where more substantial liberty interests are involved, a plain error doctrine is unneeded." *Id.* at 1364. This analysis was met with a strong dissent, which criticized the majority for proceeding on the incorrect assumption that the civil docket concerned

economic and property issues, even though in the dissent's view "much of that [civil] docket involves important issues of individual liberty." *Id.* at 1368 (Ripple, J., dissenting from the denial of rehearing en banc). We agree that liberty interests may be at stake in civil cases. But, perhaps more importantly, the due process clause explicitly protects not only liberty, but also property rights.

There is some merit to the concern that a party should not normally await the outcome of a trial before complaining, and there also are cases where a curative instruction would alleviate risks of prejudice from unfair argument.[18] But these are only factors to be considered in the balance of assessing whether due process was denied; they cannot reasonably justify a complete bar on appellate review of plain or

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[18] As a justification for its holding, the majority in *Deppe* reasoned: "We have not hesitated in the past to bind a party to its strategic decision to sit silent in the face of claimed error by refusing relief when the party complains because the result is unfavorable." *Id.* at 1363 (internal quotation marks and citation omitted). The court further considered:

> If a party fears that an objection during closing argument will incur the jury's wrath, he still must preserve his objections to any allegedly prejudicial comments. For example, a nearly contemporaneous objection made at the bench at the close of an opponent's argument, clearly stating the grounds for the objection, would preserve the matter for appellate review. Such a procedure would also afford the trial court an opportunity to attempt to cure the claimed error through use of a jury instruction.

Id. at 1363 n. 10 (internal quotation marks and citation omitted).

fundamental error, no matter how unfair and no matter how prejudicial.

The overwhelming weight of authority from other circuits supports reviewing for plain error or fundamental error when an error is alleged for the first time on an appeal in a civil case. Doubtless, contemporaneous objections at trial are to be encouraged. Where objections are made, there may be an opportunity for the trial judge to foreclose further error or to provide a curative instruction. For such reasons, courts permitting review of plain error in civil cases generally do so only in extraordinary cases.

[3] In *Kaiser Steel,* we implicitly suggested that relief would have been given for "fundamental error." 785 F.2d at 658. We now clarify our rule: We will review for plain or fundamental error, absent a contemporaneous objection or motion for a new trial before a jury has rendered its verdict, where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question.

Accordingly, here we will consider whether Glacier Construction's closing argument to the jury in tribal court offended fundamental fairness and deprived the Co-op of our Constitution's guarantee of due process.[19]

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[19] Because the Co-op limits its challenge to comity to a claim that the tribal court proceedings denied them due process, we need not decide whether a challenge to the integrity of the proceedings that does not assume the proportions of a due process violation may nonetheless be considered fundamental and cognizable on plain error review.

III

Glacier Construction in closing argued in inflammatory terms not only that the Co-op had wrongly treated plaintiff Glacier Construction's Indian-owned business, but also that there had been a legacy of injustice to Indians, broken treaties, and colonialism at the reservation:

> About eight blocks from here there's a business. . . . That business has been killed, and that's what this lawsuit is all about.
>
> Ordinarily, when you kill a human being there's laws like murder, rape, robbery, burglary that you can bring somebody that's responsible for wrongly taking another person's life.
>
> In this case the leaders of the Blackfeet Nation have done something to protect Indian businesses when they are killed, and they've passed laws called the T.E.R.O. ordinance. . . .
>
> T.E.R.O. was kind of started by the Blackfeet . . . and these laws we know exist on approximately 18 reservations, and you'll get to go through these, but just let me read what the wisdom of your tribal leaders are. This is what's [sic] they say, "And that's why as land, water, and minerals, jobs and private employment on or near the reservation are an important resource for Indian people, and Indians must use their legal rights to obtain their rightful share of them as they become available, and

> Indians have unique and special employment rights. . . ."
>
> [T]he history of the reservation has been a history of oppression and where jobs are taken away, and your tribal leaders have said on this reservation to make up for the injustice of the years, the broken treaties, the colonialism that's occurred to the reservation, being pushed up back and back and to make up for that there's a preference. That's what equity is. Indians are in first place, the last becoming the first, and that's what this T.E.R.O. is all about . . . .

Glacier Construction's counsel contended that after Bird, Gilham, and Sherburne purchased Glacier Construction, it began to receive less work from the Co-op, while a non-Indian-owned company received more. Glacier Construction's counsel referred to the "Custer massacre," and to the "cavalry" acting so that "the uprising is being put down," to describe how the Co-op had terminated and destroyed an Indian business:

> So as a kind of self-defense they go to Donny White [the T.E.R.O. director] and say Donny, this is not fair. That the T.E.R.O. laws are being violated. This Indian business is being choked out, and Donny White knows Mr. Chapman [manager of the Co-op]. He says Mr. Chapman, I think we need to meet because after all, there's T.E.R.O. laws here. We're trying to protect our own business from being killed, and what I think happens reminds me kind of a mixture of slavery and the Custer massacre.

> Mr. Chapman calls in his senior staff, all white people. . . . I think it's really interesting that the cavalry has a little meeting of the war chiefs, and they are going to come out, and he looks on this as an opportunity to tell Donny White that the uprising is being put down, and these T.E.R.O. Indians better not get too uppity and his words were it's an opportunity to tell them it's over. No warning. . . . [O]n July 11th they ride into town, and they kill, they kill these men's dream, their ambitions, their business, and did they do this fairly, did they do this honestly, did they do it rightly? I don't think so.

After disputing the Co-op's managers' motives, Glacier Construction's counsel continued in closing argument to link the Co-op's behavior to white racism in exploitation of Indians:

> This lawsuit is really about T.E.R.O., but the issue of racism has been brought up. When I hear racism—I was raised in Great Falls, and I used to walk to Saint Mary's grade school a mile each day. . . . I went right by the Charlie Russell Museum, and one thing that came to my mind is that Hill 57. . . . [T]hat's the poor Indian hill in town, there's an Indian lady walking the other way with a weathered face and little dirty dress and looks beaten down and is what strikes me right away being the disparity, and yet this was a land that once belonged to the Indian people with the buffalo and the grass and all of that, and overnight we white people, my ancestors, if we go back far enough, yours too, conquered, and the wealth had to be taken by the conquering people, and it's taken a little bit

> of time for us to come to grips with the fact that there's an institutional bias in the off reservation society. It's inherited.

Further, counsel urged Glacier Construction's theory about the Co-op's purported biased attitude toward Indians:

> All this money, such an efficient organization. How can they trust any of their work to the likes of unskilled Indian contractors like these? Certainly the white man's magic is so much better. . . . I think you have seen a classic defense to castrating the T.E.R.O. laws on the reservation. The first thing you do is say our business is so big and sophisticated that you lowly Indians, you really can't cut the mustard.

Counsel then proceeded to describe the termination of the contract between the parties as a murder:

> They did a lot of work, and they did a lot of good work, and all of sudden on June 11th they were massacred. They were killed, and when I think of murder I think of the first recorded murder in human history and kind of went like this.

Counsel, after mentioning the biblical story of Cain slaying Abel, returned to explicitly racial themes, arguing that "a lot of jobs have been killed" and "that the blood of this murdered business is crying from the ground. It's crying out to you, and it's saying don't let them kill Indian businesses."

The Co-op did not contemporaneously object to any of this argument. Nor did it move for a new trial.

[4] The Co-op's relationship with Glacier Construction was relevant to its claims. Glacier Construction's theory of the case was that the Co-op did not want to do business with an Indian-owned company, and therefore discriminated against it and intentionally breached contractual assurances and defamed the Indian owners of Glacier Construction. Despite the possible relevance of the Co-op's motive and intent, the racially inflammatory comments made during closing argument went well beyond the limits of legitimate advocacy. Glacier Construction's closing argument did not simply discuss the facts and legal theories applicable to this case, but rather attacked the Co-op and its management as part of the white race that historically oppressed the Indians. Glacier Construction's closing argument was replete with appeals to bias, including references to Custer, slavery, the cavalry riding into town to kill, "white man's magic," the wealth of the Indian people being taken by the "conquering people," and assertions "that there's an institutional bias in the off reservation society," and "functional prejudice [against Indians] that's built in." These statements were an emotionally-charged appeal to Indian collective memory, encouraging the jury to consider historical racial oppression allegedly perpetrated by the white race against Indians.

Apart from these broad racial statements, which were not specific to the Co-op or related to the Co-op's particular conduct in this case, the assertions of bias of particular Co-op managers were designed to raise prejudice and inflame the jury. Glacier Construction's counsel presented the jury with an imagined thought-process of the racist white Co-op management, wherein these managers willfully decided to "kill"

Glacier Construction's business, staffed as it was by "uppity," "lowly," and "unskilled" Indians-thoughts and words that counsel attributed to and put in the mouths of the Co-op's managers. Despite this rhetoric, there is no evidence in the record that the Co-op's managers ever used such disparaging terms to describe the owners or employees of Glacier Construction. More generally, and even viewed in the light most favorable to Glacier Construction, the tribal court record and testimony are wholly inadequate to support the racist attitudes imputed to the Co-op's managers in closing argument.

We recently decided in *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000), to reverse a verdict in a drug prosecution because of a government witness's repeated testimonial references to an asserted prominence of "Cubans" in drug trafficking. Applying the plain error standard, we concluded that "[a]ppeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." *Id.* at 594.

In *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000), we similarly condemned as error a prosecutor's closing argument suggesting that "Sikhs" had a tendency to violence and retribution. *Id.* at 974-75. However, we affirmed the district court based on our assessment of the evidence because we concluded this error was "harmless error." *Id.* at 977-78.

Glacier Construction argues that plain error review of such an appeal to prejudice is more crucial in criminal cases than in civil cases, attempting to distinguish these precedents. But fairness to parties and the need for a fair trial are important not only in

criminal but also in civil proceedings, both of which require due process. Racial stereotyping cannot be condoned in civil cases. Further, the types of inappropriate testimony and argument considered in the criminal cases above are mild if compared to the closing argument in this case.

Argumentative appeals to historical racial prejudices of or against the white race have no proper place in a civil trial, especially one in which the tribal court is exercising jurisdiction over a non-member before an exclusively tribal jury. The basis for liability of the Co-op, if such existed, in law had to be conduct of the Co-op. It is fundamental to our system of justice that persons are to be held responsible for their own conduct and not for the conduct of their ancestors. If those managing the Co-op in fact discriminated against Glacier Construction because of an anti-Indian bias, this might have provided support for legal liability on one of Glacier Construction's claims.

The conduct of Custer had no relevance to this case, and the reference to "the Custer massacre" in closing argument therefore could only have been urged in an attempt to incite prejudice and inflame the jury. The repeated analogies to "killing," the cavalry riding into town to kill, and the other prejudicial statements all had no proper purpose in this trial.

[5] But the closing argument unmistakably had the improper effect of encouraging the all-Blackfeet tribal jury to impose an impassioned sanction against the managers of the Co-op because of their race. We conclude that the Co-op was necessarily prejudiced when, in closing argument, counsel used incendiary racial and nationalistic terms to encourage the

all-Blackfeet jury's award against the non-Indian Co-op.

This argument was irrelevant and unfair to the Co-op because it focused on the Co-op managers' race rather than their deeds. It was also unfair, in another sense, to Glacier Construction, for it was deprived of the possibility of a jury verdict and vindication based on a fair proceeding. There were two versions of the case presented in evidence to the jury. Glacier Construction's version urged the Co-op's inadequate preference to tribal employment, conduct biased against Indians, and breach of its duties. The Co-op's version urged it terminated the relationship because the Co-op had financial problems and wanted to use only one contractor, and because of deficiencies in performance by Glacier Construction, including inexperienced personnel, high costs, and management problems.

We are not triers of fact. That role was assigned to the tribal court jury. But the jury's verdict was to have been rendered in a fair proceeding. In view of the closing argument, the tribal court proceeding was not fair. There is no reasoned way now to assess the competing facts presented at trial by the parties. We cannot say that the jury likely would have found the Co-op liable absent the inflammatory appeal to racial bias. Further, even if the jury might have found the Co-op liable absent the appeal to racial prejudice, we cannot now assess the amount the jury might have awarded for compensatory or for punitive damages, absent improper argument.

[6] We hold that Glacier Construction's appeal to racial prejudice in closing argument in its civil case in

tribal court offended fundamental fairness and violated due process owed the Co-op.

IV

[7] As explained above, the district court did not have discretion to give comity to the tribal court judgment in favor of Glacier Construction if the tribal court proceedings deprived the Co-op of due process. Having concluded that the closing argument of Glacier Construction offended due process by its appeal to racial enmity and bias, we reverse the decision of the district court to recognize and enforce the tribal court judgment under principles of comity. The tribal court judgment may not be recognized and enforced because to do so would again violate the due process rights of the Co-op.

Further, based on the record before us, the law requires that the district court enter summary judgment for the Co-op denying comity to the tribal court judgment. We have previously recognized that a court has power *sua sponte* to grant summary judgment to a non-movant when there has been a summary judgment motion by one party and no cross-motion. *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 311 (9th Cir. 1982). Here, there exists no genuine issue of material fact pertaining to the due process violation in closing argument, and the Co-op is therefore entitled to judgment as a matter of law.[20]

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[20] Because we conclude that due process precludes comity for the tribal court judgment in total, we need not decide whether we can enforce a tribal court's judgment for punitive damages. *Compare Her Majesty the Queen v. Gilbertson,* 597 F.2d 1161, 1163 (9th Cir. 1979) (citing *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398,

[8] We reverse the judgment of the district court and remand with instructions that the district court enter judgment for the Co-op, declining to recognize and enforce the tribal court judgment.[21]

REVERSED and **REMANDED** to the district court **WITH INSTRUCTIONS** to enter judgment for the Co-op denying comity.

413-14 (1964)) (we do not grant comity to foreign judgments when the judgment is based on foreign tax or penal laws), *with Huntington v. Attrill*, 146 U.S. 657, 666-68 (1892) (discussing rule that courts should refuse to enforce foreign penal and tax judgments, suggesting in dicta that rule has no application in civil case where a penal-like award goes to private litigant rather than to foreign government, and further stating that comity may be appropriate in *qui tam* actions that award treble damages because "the act indeed does give a penalty, but it is to the party grieved"). *Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) ("punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (punitive damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"). Further, we need not review whether the Supreme Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S.Ct. 1678 (2001), has implications for review of comity decisions regarding a tribal court judgment awarding punitive damages.

[21] Had this case been tried in federal court, our ruling might permit consideration of the possibility of a remand for a new trial. But because the case was tried in tribal court, we hold only that the tribal court judgment is not entitled to comity and may not be recognized or enforced in federal court.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NO. CV-96-22-GF

[Filed January 22, 1999]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,	)
Plaintiffs,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

ORDER

The pertinent facts attendant the above-entitled matter have been set forth in the memoranda and orders previously issued by the court herein. In short, the plaintiffs, Scott Sherburne, Ron Bird and Herb Gilham, Individually and on behalf of Glacier

Construction, Inc., instituted the present action, requesting this court to "recognize, enforce and register" a judgment entered against Glacier Electric Cooperative, Inc. ("Glacier Electric") in the Blackfeet Tribal Court, "so that execution may be issued thereon in the federal court system." Glacier Electric advances a threefold attack upon the underlying tribal court judgment. First, Glacier Electric asserts it was not afforded the requisite due process of law in the underlying tribal court proceedings and, as a result, this court should refuse to recognize and enforce the resultant judgment. Second, Glacier Electric contends the tribal court lacked personal jurisdiction and, as a result, the underlying judgment should be declared void and unenforceable. Finally, Glacier Electric maintains the absence of reciprocity between the tribal court and the federal courts should compel this court to reject the underlying judgment.

Having reviewed the record herein, including a transcript of the underlying proceedings, and having considered the arguments advanced by the parties in their respective briefs, the court is compelled to reject Glacier Electric's attempts to impeach the underlying tribal court judgment. With respect to Glacier Electric's positions regarding the lack of reciprocity and the purported absence of personal jurisdiction, the court is unpersuaded by the legal arguments advanced in support thereof. Moreover, based upon the record before it, the court is compelled to conclude Glacier Electric has failed to establish a factually sufficient basis to support its claim that the subject judgment is tainted and unenforceable as a result of a lack of due process in the underlying action.

Accordingly, the court, guided by the applicable principles of comity, is compelled to conclude the underlying tribal court judgment is entitled to recognition and enforcement in the federal courts. Consequently, the plaintiffs' motion for summary judgment is hereby GRANTED.

The Clerk of Court is directed to enter Judgment accordingly.

IT IS SO ORDERED.

DATED this 22 day of January, 1999.

/s/ Paul G. Hatfield
PAUL G. HATFIELD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NO. CV-96-22-GF

[Filed January 20, 1998]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,	)
Plaintiffs,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

MEMORANDUM AND ORDER

BACKGROUND

On July 22, 1992, Scott Sherburne, Ron Bird and Herb Gilham, Individually and on behalf of Glacier Construction, Inc. (hereinafter collectively referred to

as "Glacier Construction"),[1] instituted an action in Blackfeet Tribal Court, seeking compensatory and punitive damages as against Glacier Electric Cooperative, Inc. ("Glacier Electric")[2] under the following claims for relief: (1) breach of Tribal Employment Preference Ordinances ("TERO") and Blackfeet constitutional provisions regarding economic self-determination; (2) breach of contract; (3) constructive fraud; (4) negligent misrepresentation; and (5) defamation. Glacier Construction's complaint alleges that when the individual plaintiffs purchased the company in 1991, they did so in reliance upon certain "representations and statements" by Glacier Electric, "that it would continue to work with Glacier Construction to maintain its power grid" into the future. Glacier Construction alleges Glacier Electric breached "its commitment to employ [Glacier Construction] to maintain its power system," which caused the business to fail and resulted in substantial personal liabilities on the part of the individual shareholders.

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[1] Glacier Construction is a for-profit corporation incorporated under the laws of the State of Montana, and located in Browning, Montana, within the exterior boundaries of the Blackfeet Indian Reservation. The shareholders in Glacier Construction are the individual plaintiffs herein, i.e., Ron Bird, Herb Gilham and Scott Sherburne, all of whom reside within the exterior boundaries of the Blackfeet Indian Reservation. Ron Bird and Herb Gilham are enrolled members of the Blackfeet Indian Tribe.

[2] Glacier Electric is a non-profit rural electrical cooperative, which is duly incorporated under the laws of the State of Montana. Glacier Electric is headquartered in Cut Bank, Montana, outside the exterior boundaries of the Blackfeet Indian Reservation.

Glacier Electric entered a special appearance in the Blackfeet Tribal Court, for the purpose of filing, inter alia, a motion to dismiss for lack of jurisdiction. The tribal court denied Glacier Electric's jurisdictional challenge, and the case proceeded to trial. The Blackfeet Tribal Court jury rendered a verdict in favor of Glacier Construction on all five claims for relief and awarded $1,382,181.60 in compensatory damages and $775,000.00 in punitive damages. The tribal court ultimately entered a Judgment against Glacier Electric for the amount of damages awarded by the jury, plus various costs, together with interest thereon.

Glacier Electric appealed the tribal court's decision to the Blackfeet Tribal Court of Appeals, which ultimately affirmed the underlying tribal court judgment, with the sole exception of an award of "costs of the jury" in the amount of $4,625.00. In addition, the appellate court ruled the plaintiffs' claim for relief predicated upon a purported violation of the TERO laws and the Blackfeet Tribal Constitution failed as a matter of law.

On February 29, 1996, Glacier Construction instituted the present action, requesting this court to "recognize, enforce and register" the underlying tribal court judgment, "so that execution may be issued thereon in the federal court system." Presently before the court are the parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, regarding the propriety of the Blackfeet Tribal Court's exertion of subject matter jurisdiction over the underlying matter. The question of whether an Indian tribe retains the authority to compel a non-Indian to submit to the jurisdiction of a tribal court presents a question of federal law, properly determined by the federal courts;

the final arbiters of federal law. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985). Accordingly, the issue of whether the Blackfeet Tribal Court possessed jurisdiction over the underlying action is ripe for review before this court, in the exercise of its federal question jurisdiction under 28 U.S.C. § 1331, given the fact that all avenues of potential relief in the tribal court system have been exhausted by Glacier Electric with respect to its jurisdictional challenge.

DISCUSSION

The analysis of a tribal court's jurisdiction in a given matter must necessarily begin with the following three fundamental principles:

> (1) An Indian tribe possesses, in the first instance, all the power of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duty constituted organs of government.

State of Nevada v. Hicks, 944 F.Supp. 1455, 1463 (D. Nev. 1996), quoting, F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1942 ed.).

Accordingly, the United States Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on a reservation.[3] See, e.g. Montana v. United States, 450 U.S. 544, 566 (1981); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978). This authority emanates from the fact the several Indian tribes, as sovereign entities, possess the necessary attributes of sovereignty over both their members and their territory. United States v. Wheeler, 435 U.S. 313, 323 (1978).

The sovereignty enjoyed by Indian tribes, however, is not absolute. A tribe's inherent sovereignty is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." See, Montana v. United States, supra, 450 U.S. at 564 ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is

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[3] The Supreme Court, as far back as Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832), recognized that, in contrast to criminal jurisdiction, which the Court viewed as purely membership based, tribal court civil jurisdiction reflected a strong geographic component. In Worcester, Chief Justice Marshall described the Indian tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive." The Supreme Court has since rejected an absolute rule equating a tribe's inherent sovereignty with its reservation boundaries, see, South Dakota v. Bourland, 508 US. 679 (1993); Montana v. United States, 450 U.S. 544 (1981), but territory remains a determining factor in many jurisdictional determinations. See, United States v. Plain Bull, 957 F.2d 724, 727 (9th Cir. 1992) ("[T]ribal courts are appropriate forums for the exclusive adjudication of disputes taking place within the boundaries of a reservation.").

inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

In Montana, the Supreme Court addressed the limitations on tribal sovereignty with respect to the assertion of civil jurisdiction over the activities of non-Indians on the Crow Indian Reservation.[4] The Court, recognizing the dependent status of the tribes necessarily entails a divestiture of some attributes of sovereignty, reiterated the general rule that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. Montana, 450 U.S. at 565. The Court did, however, recognize the following two exceptions to the general rule:

> A tribe may regulate through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent

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[4] Specifically, the Supreme Court considered whether the Crow Indian Tribe possessed the authority to regulate hunting and fishing by non-members on land owned by non-members, i.e., private individuals or the State of Montana, within the reservation's exterior boundaries. The Court held the tribe could only regulate non-member hunting or fishing on land owned by the tribe or held by the United States in trust for the tribe. Montana, 450 U.S. at 564-65. Accordingly, because the regulation of hunting and fishing by non-members on land no longer owned by Indians had no "clear relationship to tribal self government or internal relations," the Court concluded the proposed regulation did not fall within the tribe's "retained inherent sovereignty." Id. at 564.

> power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66.

In the case sub judice, the dispositive issue is whether either Montana exception gives rise to a "tribal interest" sufficient to confer the Blackfeet Tribal Court with adjudicatory jurisdiction over the underlying action. Resolution of that particular issue must necessarily begin with an examination of the United States Supreme Court's most recent decision addressing tribal court jurisdiction. See, Strate v. A-1 Contractors, __ U.S. __, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

The controversy in Strate arose from a motor vehicle accident involving two non-tribal members on a North Dakota state highway within the Fort Berthold Indian Reservation. Relying principally upon Montana v. United States, the Supreme Court held that, "[s]ubject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'" Strate, 117 S.Ct. at 1413, quoting, Montana, 450 U.S. at 565. Accordingly, the Court concluded "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the

tribe to govern the conduct of nonmembers on the highway in question." Id. at 1407.

In so holding, the Court concluded the underlying motor vehicle accident did not qualify under either of the Montana exceptions.[5] With respect to the first Montana exception, the Court concluded the underlying dispute, having arisen "between two non-Indians involved in [a] run-of-the-mill [highway] accident," was "distinctly nontribal in nature," and presented no "consensual relationship of the qualifying kind." Strate, 117 S.Ct. at 1415.

> Although A-1 [non-member defendant] was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, 'Gisela Fredericks [non-member plaintiff] was

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[5] The Court also rejected the petitioners' argument that National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) broadly confirm tribal-court civil jurisdiction over claims against non-members arising from occurrences on any land within a reservation. Strate, 117 S.Ct. at 1410.

> Both decisions [National Farmers and Iowa Mutual] describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases. Accord, Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 427 n.10 (1989) (opinion of White, J.).

Id.

> not a party to the subcontract, and the [T]ribes were strangers to the accident.'

Id.

With respect to the second Montana exception, the Court held, "[o]pening the Tribal Court for [plaintiff's] optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'" Strate, 117 S.Ct. at 1416, quoting, Montana, supra, 450 U.S. at 566.

> Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them."

Strate, supra, 117 S.Ct. at 1416 (internal citations omitted)

In the case sub judice, Glacier Electric asserts that neither Montana exception is satisfied. Glacier Electric maintains the underlying action is simply "a run-of-the-mill commercial dispute involving two non-Indian corporations which were organized and exist under Montana state law." Accordingly, Glacier Electric contends Glacier Construction's claims are "distinctly non-tribal in nature," and do not satisfy the "consensual relationship" test (the first Montana exception).

It is beyond dispute that Glacier Electric is licensed by the Blackfeet Tribe to do business on the Blackfeet Indian Reservation, and does in fact engage in substantial commercial dealings with tribal members on the reservation. Nevertheless, Glacier Electric maintains those reservation contacts do not give rise to the requisite "consensual relationship," because the underlying action did not arise out of or involve Glacier Electric's consensual relationship with the Blackfeet Tribe.

Assuming, arguendo, the validity of Glacier Electric's argument, the fact remains the underlying action involved, inter alia, a contractual dispute between Glacier Electric and Glacier Construction regarding work to be performed on the Blackfeet Reservation. The fact that Glacier Construction is a non-Indian corporation organized under the laws of the State of Montana, does not preclude the Blackfeet Tribe from exercising civil jurisdiction in the underlying matter. See, Stock West Corp. v. Taylor, 964 F.2d 912, 918 (9th Cir. 1992). See also, Williams v. Lee, 358 U.S. 217, 223 (1959) ("[I]t is immaterial that respondent is not an Indian. He was on the reservation and the transaction took place there. The cases in this

court have consistently guarded the authority of Indian governments over their reservations . . . if this power is to be taken away from them, it is for Congress to do it.").

Moreover, Glacier Construction is a closely-held Montana corporation with three shareholders, two of whom are members of the Blackfeet Tribe, and all of whom reside within the exterior boundaries of the Blackfeet Reservation. Accordingly, the consensual relationship extant between Glacier Electric and Glacier Construction, which gave rise to the underlying action, i.e., the purported breach of a contractual agreement involving work to be performed on the reservation, is more than adequate to satisfy the first Montana exception. Glacier Electric's argument to the contrary is unpersuasive.

Turning to the second Montana exception, Glacier Electric asserts that regardless of whether a non-member's activities can be construed as having an impact on tribal members, tribal court jurisdiction does not exist unless it would "trench unduly on tribal self-governance" not to extend tribal jurisdiction over a given action. Accordingly, Glacier Electric contends Montana's second exception is limited to those instances where its application is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them," see, Strate, 117 S.Ct. at 1416, and, as a result, will only be met in limited circumstances where application of tribal law is essential to preserve internal governance.

Glacier Electric's position is predicated upon an expansive reading of State -- e.g., "[T]he Supreme Court's extensive discussion in Strate of the various

fact situations in which the two Montana exceptions do or do not apply serves as a clear signal that Strate has far broader reach than simply to motor vehicle accidents on state highways." Glacier Electric's Reply Brief in Support of Motion for Summary Judgment, page 5. The court, however, rejects the expansive reading of Strate advocated by Glacier Electric.

Justice Ginsburg, writing for the unanimous Court, succinctly stated the scope of the Strate decision in its opening paragraphs:

> This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members. Specifically, we confront this question: When an accident occurs on a portion of a public highway maintained by the State under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?

Strate, supra, 117 S.Ct. at 1407-08. In addition, the Strate opinion is careful to emphasize that the land on which the underlying accident occurred was a state highway, and the Court expressed no opinion on whether the same result would obtain under different facts. Id. at 1408 ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation."). See also, Wilson v. Marchington, 127 F.3d 805, 815 (9th

Cir. 1997)[6] ("Thus, although the parameters of the Strate holding are not fully defined, its application to the specific circumstances of this case precludes tribal court jurisdiction."). Accordingly, Glacier Electric's attempt to expand the scope and impact of Strate runs contrary to the precise issue addressed therein, as expressed in the text of the opinion itself.

Moreover, the broad reading of Strate urged by Glacier Electric would undermine prior Supreme Court decisions expressly recognizing a federal policy favoring the promotion of tribal self-government and

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[6] In Wilson, the plaintiff, Mary Jane Wilson, an enrolled member of the Blackfeet Indian Tribe, filed suit in the Blackfeet Tribal Court, seeking compensatory and punitive damages based upon the purported negligence of defendants Thomas David Marchington and Inland Empire Shows, Inc. The action had its genesis in an automobile accident which occurred on U.S. Highway 2, within the exterior boundaries of the Blackfeet Indian Reservation, when a semi-tractor trailer driven by a non-tribal member defendant collided with Wilson's vehicle. The Ninth Circuit Court of Appeals ultimately held the Blackfeet Tribal Court did not have subject matter jurisdiction over the underlying action. The court rejected the argument that a traffic accident injuring a tribal member sufficiently affects the economic security, political integrity, or the health and welfare of the tribe, thereby satisfying the second Montana exception.

> Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule.

Wilson, 127 F.3d at 814, quoting, Strate, supra, 117 S.Ct. at 1415.

self-determination.[7] As recognized by the Supreme Court in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985), tribal self-government and self-determination are inextricably linked to the continuing enhancement of the legitimacy of the tribal courts. See also, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1986) ("Tribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development."); Weeks Construction, Inc. v. Oslala Sioux Housing Authority, 797 F.2d 668, 673 (8th Cir. 1986) ("The power to hear and adjudicate disputes arising on Indian land is an essential attribute of [tribal] sovereignty.").

The continuing vitality of the federal policy supporting tribal self-determination and self-government is evident from the fact the Supreme Court, in creating the two exceptions that allow tribal courts to exert civil jurisdiction over non-Indians, specifically cited its prior decision in Williams v. Lee, 358 U.S. 217 (1959). See, Montana, supra, 450 U.S. at 565-66. In Williams, the Court held the tribal court had jurisdiction over a suit by a non-Indian store owner on the Navajo Indian Reservation against two members of the tribe for breach of contract based on a transaction that occurred on the reservation. 358 U.S. at 223. The Court reasoned that allowing state courts to exercise jurisdiction over disputes arising on the reservation and involving significant tribal interests

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[7] See e.g., Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1986); Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986); National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 846, 856 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982).

would "undermine the authority of the tribal courts over reservation affairs and hence would infringe upon the right of the Indians to govern themselves." Id. The Court further explained that "[t]he cases in this court have consistently guarded the authority of Indian governments over their reservations . . . [and] [i]f this power is to be taken away from them, it is for Congress to do it." Id. See also, State of Montana v. Gilham, 127 F.3d 897, 904 (9th Cir. 1997) ("The jurisdiction of tribal courts is an important and vital matter. Development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged.").

Given the commitment to tribal self-government and self-determination, established by Congress and supported by the Supreme Court, the Blackfeet Tribal Court must be allowed to exercise its authority over the underlying action. Even Strate and Montana, cases that curtailed tribal authority over non-Indians, recognized that tribes retain a core sovereign interest in protecting the health and welfare of the tribe such that they may exercise civil jurisdiction over certain activities of non-Indians on reservation lands. See, Strate, supra, 117 S.Ct. at 1413 ("We 'can readily agree', in accord with Montana, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land.").

The underlying tribal court action involved a dispute between Glacier Electric and Glacier Construction regarding, inter alia, a purported contractual agreement, as well as representations made prior to the execution thereof, which dealt, at least in part, with the performance of work upon the

Blackfeet Indian Reservation.[8] Moreover, it is beyond dispute that Glacier Electric, at all pertinent times, had a continuous presence on the Blackfeet Indian Reservation, e.g., utility poles and lines which crisscross the reservation, as well as contractual and business relationships with many tribal members. Glacier Electric's business activities, which include the provision of electric power to a substantial number of reservation members, necessarily has a major impact on the health and welfare of the Blackfeet Indian Tribe. Given Glacier Electric's significant ties to the reservation, the court is compelled to conclude the tribe's ability to govern or to protect its own members would be severely undermined if the tribal court was precluded from asserting jurisdiction over the underlying action, which involved allegations of tortious conduct, as well as a breach of contract,

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[8] Glacier Electric argues the underlying business dispute arose from off-reservation "representations and statements" and, consequently, tribal court jurisdiction is not necessary to protect "the political integrity, the economic security, or the health or welfare" of the Blackfeet Tribe. Specifically, Glacier Electric maintains that because the contract was negotiated and purportedly executed off the reservation, the resultant contract dispute lacks the requisite ties to the reservation, thereby precluding tribal court jurisdiction. The court is unpersuaded by Glacier Electric's argument. Although the purported contract between Glacier Construction and Glacier Electric was negotiated and executed by the parties at Glacier Electric's office in Cut Bank, Montana, outside the exterior boundaries of the Blackfeet Indian Reservation, the performance thereof was, for the most part, to occur within the confines of the reservation. Accordingly, the court finds the locus of the dispute in this case centered upon the Blackfeet Indian Reservation, and there were no "substantial activities giving rise to a dispute" arising outside the reservation. See, R. J. Williams Co. v. Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1983).

resulting in economic injury to tribal members, who lived and worked on the reservation. Accordingly, the underlying tribal court action falls within the second Montana exception, given the fact a sufficient tribal interest exists for the Blackfeet Tribal Court to exert, based upon the tribe's inherent sovereign power, subject matter jurisdiction over the underlying dispute.

In so holding, the court notes the present action is clearly distinguishable from Strate. As set forth above, the underlying dispute affects the tribe's political integrity because it deals with the tribe's ability to function as a fully sovereign government, whereas Strate involved the tribe's asserted ability to exercise plenary judicial authority over nonmembers simply because they crossed the reservation's boundaries. Restated, the only governmental interest alleged in Strate was the tribe's asserted right to exercise full sovereign authority over events that happen within its geographic boundaries, regardless of the impact upon the tribe.

CONCLUSION

Therefore, for the reasons set forth herein, the court concludes the motion for summary judgment filed on behalf of Glacier Construction, with respect to the subject matter jurisdiction of the Blackfeet Tribal Court be, and the same hereby is, GRANTED. The motion for summary judgment filed on behalf of Glacier Electric is hereby DENIED.

IT IS SO ORDERED.

DATED this 20 day of January, 1998.

/s/ Paul G. Hatfield

PAUL G. HATFIELD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

IN THE COURT OF APPEALS FOR THE BLACKFEET INDIAN RESERVATION

Blackfeet Tribal Court
Cause No. 92-CA-269

[Filed August 31, 2010]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
-vs-	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

ORDER GRANTING PETITION FOR WRIT OF EXECUTION

On April 6, 2009, Plaintiffs herein filed a Petition for Writ of Execution requesting this Court, pursuant to Ordinance No. 81, Blackfeet Commercial Code to

issue a writ of execution in order to enforce the Judgment entered in this matter May 19, 1993.

The Court held a hearing on September 1, 2009 at 10:00 a.m. in order to determine whether the Writ of Execution should be issued and the procedure to execute upon property available for execution.

Following argument, this Court concluded that a Writ of Execution should be issued. Under Ordinance No. 81 procedures for enforcement of judgments was adopted and approved. Those procedures provide that, after petition, response and hearing, a Writ of Execution may be issued by the clerk of the Tribal Court directed to "the BIA or tribal police" and shall specify the particular property of the judgment debtor (Glacier Electric) available to satisfy the Judgment and shall "direct the BIA or tribal police to seize the specified property and deliver to the clerk."

After the property is seized, the BIA or tribal police must deliver the property to the clerk along with the Writ. The BIA or tribal police shall issue a receipt to the holder of the property seized, together with a copy of the Writ for the property seized pursuant to the Writ. The property must be returned within thirty days of issuance of the Writ. If non-cash personal or real property is seized, it is subject to sale and the proceeds of the sale are applied to the Judgment. If the proceeds are not sufficient to satisfy the Judgment, the judgment debtor is liable for the deficiency and the judgment creditor may use any methods provided in the Code, including additional Writs of Execution, to collect the deficiency.

Plaintiffs herein, the judgment creditors, have asked this Court to authorize the clerk to issue a Writ directing the tribal police or BIA to seize payments on power bills or accounts receivable of the Defendant, Glacier Electric, the judgment debtor from the Glacier Electric payment office located within the boundaries of the Blackfeet Reservation and from customers within the Reservation who owe money to Defendant. The Court has determined that the Writ should issue in order to provide a means to enforce the Judgment.

Therefore, IT IS HEREBY ORDERED that the Petition of Plaintiffs is granted and Plaintiffs may present to the Clerk of Court an appropriate Writ of Execution for issuance.

DATED this 31st day of ~~June~~ August 2010.

Dawn Bitz - Running Wolf for:
By: /s/Don Sollars
Don Sollars, Judge
Blackfeet Tribal Court

cc: Gary M. Zadick
Patrick F. Flaherty
Paul Haffeman

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX H

IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION

CASE NO. 92-CA-269

[Filed May 16, 2008]

IN THE MATTER OF:	)
	)
RON BIRD, HERB GILHAM AND SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
PLAINTIFF,	)
	)
VS.	)
	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
DEFENDANT.	)
	)

ORDER

This matter having come on for a debtor's exam hearing on the 22nd day of April 2008. Present at the hearing were Gary M. Zadick and Patrick Flaherty, attorney for plaintiff's and Paul R. Haffeman, attorney for Defendant. Mr. Haffeman stated that he did not produce the manager or the records needed for his

debtor's exam because the defendant, Glacier Electric Co-op had filed into Federal Court concerning the lack of personal jurisdiction by this court. However this court as does the Federal Court systems have laws and procedures to follow. Under the Blackfeet Tribal Code, a stay of proceedings must be filed into Tribal Court or a stay granted by the Federal Court. With the above facts the court issues the following:

O R D E R

Plaintiff's Glacier Electric Co-op and their attorney, Paul R. Haffeman are in contempt of this court and fined one thousand ($1,000.00) dollars to be paid before the next hearing, which will held on the 25th day of June 2008 at 11:00 o'clock a.m. Failure to appear without the manager and all records and documents pertaining to this case will result in further fines for contempt.

IT IS SO ORDERED:

Dated this 16th day of May, 2008.

(Court Seal)

/s/ Don Sollars
Don Sollars, Judge
Blackfeet Tribal Court

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX I

IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION

Case No. 92-CA-269

[Filed March 26, 2008]

IN THE MATTER OF:	)
	)
SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.	)
Plaintiffs	)
	)
VS.	)
	)
GLACIER ELECTRIC COOPERATIVE, INC.	)
Defendant.	)
	)

ORDER

IT IS HEREBY ORDERED that the hearing set for the debtors exam on this 26th day of March, 2008 at the hour of 10:30 am. is reset, and shall be heard on the 15th day of April, 2008 at the hour of 10:00 am.

IT IS SO ORDERED:

Dated this 26th day of March, 2008.

(Court Seal)

/s/ Don Sollars
Don Sollars, Judge
Blackfeet Tribal Court

* * *

[Certificate of Service Omitted from Printing of this Appendix]

APPENDIX J

The Blackfeet Tribal Court
P.O. Box 1170
Browning, Montana 59417

IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION

CAUSE NUMBER 92 CA 269

[Filed February 27, 2008]

IN THE MATTER OF:	)
	)
SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc., Plaintiffs,	)
	)
vs.	)
	)
GLACIER ELECTRIC COOPERATIVE, INC.	)
	)

ORDER

THIS MATTER having been heard on February 12, 2008 at 10:00 a.m. with presiding judge Don Sollars. Appearing for plaintiffs/respondents was attorney,

Patrick F. Flaherty and Gary M. Zakick and appearing for Glacier Electric Cooperative, Inc, defendant/appellant, was attorney, Paul R. Haffeman.

The Court having heard arguments on four (4) issues "jurisdiction, the six (6) year time limit, (according to "the Blackfeet Commercial Code), Due Process, and the Decision of "the 9th Circuit Court of Appeals."

FINDINGS OF FACT

Glacier Electric Cooperative, Inc., is a Montana Cooperation, formed in 1945, under the Rural Electric and Telephone Cooperative Act, Title 35, Chapter 18, MCA.

Glacier Electric's principal office is located in Cut Bank, Glacier County, Montana and is located off the Blackfeet Indian Reservation. Glacier Electric Co-Op maintains a branch office in Browning, Glacier County, Montana located within the boundaries of the Blackfeet Indian Reservation.

Glacier Electric owns and maintains real and personal property, an office in Browning, Montana, equipment, easements, right of ways and other assets on the Blackfeet Indian Reservation. Glacier Electric Co-Op serves areas including all of Glacier County, including a portion of Pondera County, located on the Blackfeet Indian Reservation.

Glacier Electric Co-op's membership includes consumers both on and off the Blackfeet Indian Reservation, which includes Indians and non-Indians alike. Glacier Electric serves all persons, firms,

corporations, and governmental entities, in a non-discriminatory manner.

Glacier County, the State of Montana, and Glacier Electric Co-Op maintain a significant presence on the Blackfeet Reservation and provide important essential services.

Judgment was entered in cause number 92-CA269 on May 19, 1993, judgment was appealed by Glacier Electric Co-Op. The Blackfeet Court of Appeals affirmed the jury verdict on May 30, 1995.

The above judgment was appealed to Federal District Court, with the Honorable Judge Paul G. Hatfield.

Chapter 2, Sec 3, Sub Sec B, the defendant's have failed to produce a statement identifying the property available for execution under this chapter and section of The Blackfeet Commercial Code in actual value and location. This chapter and section only applies to the Blackfeet Indian Reservation.

CONCLUSIONS OF LAW

1. Jurisdiction

This Court has personal and subject matter jurisdiction over Glacier Electric, Co-Op and Plaintiffs in this cause of action. Pursuant to Montana v. United States 450 US 544 (1981).

Judgment was entered May 19, 1993 by jury trial and then was appealed to the Blackfeet Court of Appeals by Glacier Electric Co-Op. The judgment of

the Tribal Court of Appeals was appealed to Federal District Court, the Honorable Judge Paul G. Hatfield presiding.

Judgment was then appealed to the 9th Circuit Court of Appeals.

The 9th Circuit Court of Appeals, footnote #7 Page 8751, the Co-Op also took the position that the judgment should not be recognized because the Blackfeet Tribal Court lacked personal jurisdiction over it, and because of the absence of reciprocity between the Blackfeet Tribal Court and the Federal Courts. It has abandoned these positions on appeal, for summary judgment based on lack of personal jurisdiction, but has abandoned that position on appeal.

2. Time Limit

Six (6) year time limit under the Blackfeet Commercial Code, Chapter 2, Section 3, Sub Section A states "then a Tribal Court judgment has not been paid or otherwise satisfied, the party in whose favor judgment was entered is entitled at any time within six (6) years after entry of judgment, excluding any period during which execution is stayed or enjoined to a writ of execution to enforce the judgment.

Under the Blackfeet Commercial Code, Chapter 2, Section 3, Sub Section B in part states "the amount of judgment or the terms of judgment, a statement identifying the property's available for execution under this code; it' actual value and location.

The above judgment was appealed to the 9th Circuit Court of Appeals, Judge Paul G. Hatfield presiding. At issue were jurisdiction and due process.

The US 9th District Court of Appeals stated "because we have only the suit by Glacier Construction and its principals to recognize and enforce the Blackfeet Tribal Court's judgment, we do not address the merits of Glacier Construction's claim, nor do we address whether there may be further proceedings in Tribal Court.

Due process falls under not only the Tribal Court but also under the Indian Civil Rights Act of 1968.

ORDER

With the above Findings of Fact and Conclusions of Law the Blackfeet Tribal Court makes the following order.

This Court retains its jurisdiction over Glacier Electric Co-Op, Inc. according to "Montana v. US 450 US 544 (1981)." There were two (2) exceptions to the Montana Rule case. The first is "non-Indians on fee lands within the reservation, the second has some direct effect on the political integrity and the economic security, health and welfare of the Tribe. This alone gives jurisdiction to the Blackfeet Tribal Court.

The United States 9th Circuit Court of Appeals @ page 8748, "because we have only the suit by Glacier Construction and its principals to recognize and enforce the Tribal Court judgments, we do not address the merits of Glacier Construction's claim nor do we

address whether there may be further proceedings in Tribal Court."

The 9th Circuit Court of Appeals, footnote #7, page 8751, "the Glacier Electric took the position that the Tribal Court judgment should not be recognized. It was dropped on appeal.

The Blackfeet Tribal Court has jurisdiction in this matter. The Co-Op asked for summary judgment because of lack of personal jurisdiction, this too was abandoned on appeal.

Due Process under the Indian Civil Rights Act of 1968 in that the closing argument was prejudices to Glacier Electric. Due Process was never raised in Tribal Court nor was it raised in the Blackfeet Court of Appeals. That is where it should have been raised, not in the Federal Court of Appeals.

Under the Blackfeet Commercial Code, Chapter 2, Section 3 A, when a Tribal Court judgment has not been paid or otherwise satisfied, the party in whose favor judgment was entered is entitled at any time within six (6) years after entry of judgment, excluding any period during which execution is stayed or enjoined, to a writ of execution to enforce the judgment. However in reading further under Chapter 2, Section 3, B in part "a statement identifying the property available for execution under this code; its actual value and location." The motion or requests for this have gone unanswered.

All files pertaining to this cause will be brought into this Court and reviewed including all witnesses to this cause of action.

The above pertains to the property located on the Blackfeet Indian Reservation. This includes equipment, easements, rights of ways, and all other property owned or controlled by Glacier Electric Co-Op.

The decision of the 9th Circuit Court of Appeals is mentioned throughout this order.

The Blackfeet Tribal Court addressed the following issues as follows:

1. Lack of Jurisdiction – denied.
2. Lack of Due Process not timely made – denied.
3. The six (6) year time limit – denied.

It is so ordered.

Dated this 27 day of February 2008.

/s/ Don Sollars
BLACKFEET TRIBAL COURT JUDGE
HONORABLE DON SOLLARS

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX K

IN THE COURT OF APPEALS
FOR THE BLACKFEET INDIAN RESERVATION

Blackfeet Tribal Court
Cause No. 92-CA-269

Blackfeet Court of Appeals
Cause No. 2003-AP-15

[Filed March 13, 2007]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc., Plaintiffs/Respondents,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC., Defendant/Appellant.	)

DECISION AND ORDER

Currently before this Court is an appeal from the Decision of the Honorable Joseph Moran dated August 20, 2003, allowing the Plaintiffs to examine the Judgment Debtor.

Oral argument was held on September 27, 2005. The Honorable Lenore Salois has retired and the Honorable Jackie Parsons has assumed her duties. This Court having considered the record, enters the following:

FINDINGS OF FACT

1. A judgment was entered on May 19, 1993, by a unanimous Tribal Court Jury after a three-week Trial in which they found that the Defendant breached its contract with the Plaintiff and committed other wrong acts such as defamation. A verdict of $2,157,181.60 was awarded.

2. The Judgment was appealed by the Co-op and the Blackfeet Appellate Court affirmed the Jury Verdict on May 30, 1995.

3. The Plaintiffs also obtained an Order of Summary Judgment in Tribal Court Cause No. 94-CA-32, against The Federated Rural Electric Insurance Cooperative, and Glacier Electric Cooperative, Inc., Defendants, wherein the Court held,

> IT IS FURTHER ORDERED that insurance coverage is established, provided and available for payment of the Judgment in Case No. 92-CA-269, which Judgment was filed with The Blackfeet Tribal Court on May 19, 1993. The insurance coverage is provided by policies issued by The Federated Rural Electric Insurance Corporation as follows: (1) Policy No. 25 ARB 005, described as an "all-risk blanket policy," up to the stated limits of $1,000,000; (2) Policy No. 25-DOM 012-92, described as a

"Directors Managers Officers Liability and Corporate Indemnification Policy" up to the stated limits of $10,000,000; and (3) Policy No. 25 UMB 005, described as a "Commercial Umbrella Policy," up to the stated limits of $10,000,000; and

Dated this 12th day of September, 1994.
/s/
Don Sollars
Tribal Court Judge

4. The Co-op's insurance carrier did not pay the judgment, while the Co-op appealed the matter to the Ninth Circuit Court of Appeals, which held that the Judgment cannot be enforced off of the reservation, but it recognized that the Tribal Court Judgment was valid and enforceable on the sovereign Blackfeet Nation. See, Bird v. Glacier Electrical Coop, 255 F.3d 1136 (9th C.C.A. 2001).

5. Thereafter, the Plaintiffs sought to examine the judgment debtor so that the Tribal Court Judgment could have meaning and be paid.

6. The Co-op has refused to honor the judgment, stating that too much time has passed, that the Tribal Judgment (and Court) are unfair. They seek to be excused from paying a valid judgment because of delays caused by their expensive and lengthy appeals.

CONCLUSIONS OF LAW

1. The Tribal Court Judgment is valid and enforceable. The use of time-consuming, costly legal challenges and multiple appeals cannot be used as an

excuse for refusing to compensate Tribal members for wrongs done to them.

2. The courts of one sovereign nation must show appropriate deference to the proceedings undertaken by the courts of another sovereign nation. The federal courts have repeatedly stated:

> [C]ourts will not examine the validity of acts of foreign states-even if in conflict with our notions of justice–if those acts are executed within the foreign state's territory.

Tchacosh Co. Ltd. V. Rockwell Internat'l. Corp., 766 F.2d 1333, 1335-36 (9th Cir. 1985), citing *Banco Nacional deCuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Underhill v. Hernandez* 168 U.S. 250, 252 (1897)

3. While the Ninth Circuit Court in *Bird, supra,* chose not to allow the judgment entered by ths Court to be enforced in federal court, the Ninth Circuit Court did not, nor could it under the referenced principle, declare the judgment to be "invalid," as suggested by Glacier Electric. As intimated by the Ninth Circuit Court of Appeals, and consistent with this principle of law, the judgment entered by this Court is valid and fully enforceable within the territorial jurisdiction of the Blackfeet Indian Nation. The Supreme Court of the United States made this point abundantly clear in *Sabbatino,* wherein the Court stated:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to

> property brought within the custody of a court. . . as it was held to be to those cases cited, in which claims for damages were based upon acts in foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

Sabbatino, *supra*, 376 U.S. at 417-18, quoting *Underhill*, *supra*, 246 U.S. at 303-304.

4. The Tribal Court possessed and appropriately exercised jurisdiction. Upon appeal of the underlying judgment to the Court of Appeals for the Blackfeet Indian Reservation, Glacier Electric challenged the subject matter jurisdiction of the Tribal Court. Consistent with the principles of tribal court jurisdiction enunciated in *Montana v. United States*, 450 U.S. 544 (1981), the Blackfeet Appellate Court unanimously stated as follows:

> We hold that the Blackfeet Tribal Court has both subject matter and *in personam* jurisdiction over ths cause.

Bird et al v. Glacier Electric Cooperative, Inc., No. 93-AP-18, Slip Op. 8-10 (1995).

5. In the federal enforcement action, Glacier Electric again challenged the subject matter jurisdiction of the Tribal Court. The United States District Court, the Honorable Paul G. Hatfield

presiding, rejected this challenge and held that the Tribal Court did, in fact, possess jurisdiction over the subject matter of the controversy. *Sherburne, et al. v. Glacier Electric Cooperative, Inc.*, No. CV-96-22-GF (Memorandum and Order dated January 20, 1998.) Although Glacier Electric initially challenged the District Court's ruling upon appeal to the Ninth Circuit Court of Appeals, Glacier Electric conceded the subject matter jurisdiction of the Tribal Court by abandoning the issue on appeal. Accordingly, the federal district court's determination upon the issue of Tribal Court jurisdiction stands unassailable. Glacier Electric is precluded from re-litigating the issue.

6. Likewise, Glacier Electric conceded the Tribal Court possessed personal jurisdiction over Glacier Electric, having abandoned that issue upon appeal in the federal enforcement action. *Bird*, *supra*, 255 F.3d at 1153, n. 7.

7. Clearly, the Blackfeet Tribal Court possessed both subject matter and *in personam* jurisdiction over this action, as expressly concluded by the Blackfeet Court of Appeals. As such, the judgment of the Blackfeet Tribal Court is final and enforceable within the territorial jurisdiction of the Blackfeet Tribal Court.

8. The Federal enforcement action was necessitated by Glacier Electric's failure to post a supersedeas bond or otherwise tender available insurance proceeds to satisfy the judgment.

In pursuing its appeal to the Blackfeet Court of Appeals, Glacier Electric failed to post a supersedeas bond as required by Chap. 11, Sec. 35, Blackfeet Tribal

Law and Order Code of 1967. Nonetheless, the Blackfeet Appellate Court, out of an abundance of fairness, allowed Glacier Electric's appeal to proceed. However, because no bond had been posted, the plaintiffs were without an expedient remedy to satisfy the judgment after the Blackfeet Appellate Court affirmed the judgment.

9. The plaintiffs also made demand upon Glacier Electric's insurer, the Federated Rural Electric Insurance Corporation, to satisfy the judgment pursuant to the terms of the liability insurance policies issued by Federated to Glacier Electric.[1] Rather than satisfying the judgment from available insurance proceeds, Federated compelled the plaintiffs to institute a declaratory judgment action in Tribal Court. *Sherburne, et al v. The Federated Rural Electric Ins. Corp, and Glacier Electric Cooperative, Inc.,* Cause No. 94-CA-32. On September 12, 1994, the Tribal Court, the Honorable Don Sollars presiding, entered judgment in the declaratory judgment action holding as follows:

> [I]nsurance coverage is established, provided, and available for payment of the judgment in Case No. 92-CA-269, which judgment was filed with the Blackfeet Tribal Court on May 19, 1993. The insurance coverage is provided by policies issued by the Federated Rural Electric Insurance Corporation as follows: (1) Policy No. 25ARB005, described as an "all-risk blanket

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[1] The referenced policies are an all risk blanket policy (liability limit: $1,000,000), Commercial Umbrella Policy (liability limits: $10,000,000), Indemnification Policy (liability limits: $10,000,000).

> policy," up to the stated limits of $1,000,000; (2) Policy No. 25-DOM012-92, described as a "directors, Managers, Officers Liability and Corporate Indemnification Policy" up to the stated limits of $10,000,000; and (3) Policy No. 25UMB005, described as a "commercial umbrella policy up to the stated limits of $10,000,000.

(Order Granting Motion for Summary Judgment, Slip Op., p. 2).

Federated appealed the judgment to the Blackfeet Court of Appeals (Cause No. DV-94-CA-32. That appeal is presently pending.

10. Faced with the refusal of Glacier Electric and its insurer to satisfy the final judgment entered in this case, the plaintiffs instituted the federal enforcement action in 1996 to satisfy the judgment through execution upon Glacier Electric's "off-reservation" assets. The matter, however, languished in federal court from 1996 until October 2, 2001, when the Ninth Circuit Court of Appeals entered judgment in *Bird, supra.*

11. The Ninth Circuit Court of Appeals declined to extend comity to the Tribal Court judgment based upon what it perceived to be an impermissible "closing argument" by plaintiffs' counsel; an argument which the Ninth Circuit Court of Appeals interestingly characterized as follows:

> These statements were an emotionally-charged appeal to Indian collective memory, encouraging the jury to consider historical racial oppression

allegedly perpetrated by the white race against Indians.

Bird, supra, 255 F.3d at 1150.

12. Although the Ninth Circuit Court of Appeals chose not to extend comity to the Tribal Court Judgment because of what that Court perceived to be an improper closing argument, the Court's conclusion does not affect the validity of the underlying Tribal Court judgment or its enforceabilty within the territorial jurisdiction of the Tribal Court. As more fully discussed below, Glacier Electric was afforded an appeal to the Blackfeet Court of Appeals but did not even raise the issue of improper closing argument to the Blackfeet Appellate Court. Instead, Glacier Electric chose to avail itself of tribal court procedure and only raised the issue of improper closing argument before the Ninth Circuit Court of Appeals.

13. The refusal of Glacier Electric to post a supersedeas bond or otherwise satisfy the judgment and obey the laws of the Blackfeet Nation has compelled the plaintiffs to now seek the assistance of this Court to enforce the judgment. Glacier Electric received a jury trial upon the merits. When the jury verdict turned out to be adverse to Glacier Electric, it was afforded a full review by the Blackfeet Appellate Court. When the Blackfeet Appellate Court affirmed the judgment, Glacier Electric refused and continues to refuse, to satisfy the judgment. The Court must not condone this affront to the tribal court system.

14. Glacier Electric was afforded due process of law in the Tribal Court proceeding because Glacier Electric was afforded a jury trial upon the merits and an

exhaustive appeal, during the course of which Glacier Electric never challenged the propriety of plaintiffs' closing argument.

15. Review of the tribal court record reflects Glacier Electric procedurally defaulted in three distinct respects:

(a) Glacier Electric did not render any contemporaneous objection to the closing argument, thereby depriving the trial judge of the opportunity to admonish counsel and instruct the jury to disregard the argument.

(b) Glacier Electric did not move the Tribal Court for a new trial in accordance with Rule 6, Chap. 9, of the Blackfeet Tribal Law and Order Code of 1967. This Court should adopt the reasoning announced by the Florida Supreme Court specifically addressing the issue of when relief may be granted in a civil case, based upon improper, but unobjected-to, closing argument. *Murphy v. Internat'l. Robotic Systems, Inc.*, 766 S.2d 1010 (Fla. 2000). After surveying both federal and state decisional law, the court in *Murphy* announced a straightforward and workable rule:

> [W]e now hold that a civil litigant may not seek relief in an appellate court based on improper, but unobjected-to, closing argument unless the litigant has at least challenged such argument in the trial court by way of a motion for new trial

> even if no objection was voiced during trial.
>
> 766 S.2d at 1027
>
> Glacier Electric had the opportunity to move for a new trial, but deliberately failed to do so, only to raise its challenge to the closing argument before the Ninth Circuit Court of Appeals in the federal enforcement action. This Court must not condone this procedural default when the remedy was clearly available under existing tribal law.

c) Glacier Electric did not raise the issue of misconduct in its appeal to the Blackfeet Appellate Court, as required by Sec. 32, Chap. 11, Part III of the Blackfeet Tribal Law and Order Code of 1967. Again, Glacier Electric deliberately chose not to raise the issue of improper closing argument to the Blackfeet Appellate Court.

16. Glacier Electric was represented at trial by two attorneys with extensive experience in state and federal court, and at least ten years of experience in the Blackfeet Tribal Court.

17. Glacier Electric was not denied due process of law by the tribal justice system. Clearly denominated procedures to challenge plaintiffs' closing argument were available under tribal law. These procedures included the right of Glacier Electric to seek a new trial and have its due process complaint reviewed both

at the trial level and on appeal. Glacier Electric chose not to utilize those procedures.

18. The assets of Glacier Electric are subject to execution under the Tribal Code. Glacier Electric undoubtedly has the assets to satisfy this judgment without disruption to any electrical service. It cannot be over-emphasized that insurance proceeds are available to satisfy this judgment, but Glacier Electric, in conjunction with its insurer, have simply refused to recognize the legitimacy of the tribal justice system.

19. This Court will not overlook the importance of the tribal court system to the well being of the Blackfeet Indian Nation. If an entity, like Glacier Electric, can operate upon the Reservation and yet ignore the validity of a judgment issued by the judicial branch of government, then the ability of the Tribe to effectively govern will be irreparably harmed. Tribal members, like these plaintiffs, have an absolute right to have their civil litigation resolved in a tribal forum. Glacier Electric, although its lifeblood comes from the Blackfeet Indian Reservation, refuses to abide by a judgment, legitimately entered by the Tribal Court and affirmed by the Blackfeet Court of Appeals.

20. Contrary to the argument presented by Glacier Electric, Glacier Electric's assets are subject to execution under the Tribal Code. Glacier Electric invokes Chap. 10, Sec. 39A(7) of the Blackfeet Tribal Law and Order Code of 1967 to suggest that it should be treated as a "public or municipal corporation" with the meaning of this Code provision. Glacier Electric, however, is not a public or municipal corporation. Ths provision of the Tribal Code was clearly designed to prevent execution upon the property of a governmental

entity or a corporation formed to provide governmental services.

21. Glacier Electric's argument is akin to suggesting that the property of the Montana Power Company could not be executed upon in state court. Granted, Glacier Electric is organized under Title 35, Chap. 18 of the Montana Code, but it is not considered a "quasi-public agency" and Glacier Electric cites no authority for this proposition. Importantly, §35-18-106, M.C.A., expressly recognizes that a cooperative has the power to "sue and be sued." Glacier Electric is undoubtedly subject to suit in state court, and its property may be executed upon to satisfy a judgment entered in state court. The result must be no different in Tribal Court.

22. Finally, Glacier Electric seeks to convince this Court that because Glacier Electric is not a member of the Blackfeet Tribe, the Chief of Tribal Police may not take or hold assets of Glacier Electric under authority of Chap. 10, Sec. 34 of the Blackfeet Law and Order Code of 1967. This argument has no merit whatsoever. As noted at the outset of this discussion, Glacier Electric has conceded that the Blackfeet Tribal Court possessed both subject matter jurisdiction over this controversy and *in personam* jurisdiction over Glacier Electric. As such, the Blackfeet Tribal Court may, indeed, ensure that the valid judgment entered against Glacier Electric is enforced.

23. The jurisdiction of the Blackfeet Tribal Court would certainly be "hollow" if a civil judgment entered by that court is simply unenforceable against a non-member within the territorial jurisdiction of the Blackfeet Tribal Court. The ramifications of Glacier

Electric's argument, if accepted, would go well beyond this case. The end result would be that the Tribal Court would be relinquishing its sovereign right to enforce a civil judgment against non-members of the Tribe.

24. In *Montana v. United States*, *supra*, the Supreme Court of the United States expressly recognized that a Tribe may exercise civil jurisdiction over the activities of non-member "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, *supra*, 450 U.S. at 465-66. The Blackfeet Appellate Court has already determined that the Blackfeet Tribal Court has both subject matter and *in personam* jurisdiction over this cause. This jurisdiction undoubtedly extends to enforcement of the civil judgment. Glacier Electric suggests the Tribal Court is nothing more than a "paper tiger" with no enforcement authority against a non-member. The *Montana*, *supra*, decision states otherwise.

25. Glacier Electric has a pervasive presence on the Blackfeet Indian Reservation. Because of that pervasive presence and its contractual dealings with these plaintiffs, the Blackfeet Appellate Court has already determined, and Glacier Electric has conceded that the Tribal Court possessed jurisdiction over this action and jurisdiction over Glacier Electric.

26. Glacier Electric actively participated in a jury trial upon the merits of this action and was afforded a comprehensive and fair review by the Blackfeet Court of Appeals. At no time did Glacier Electric ever raise a due process challenge to the plaintiffs' closing argument. Based upon its default in invoking the

procedures available under the Blackfeet Tribal Law and Order Code to challenge the plaintiffs' closing argument in a timely fashion, Glacier Electric cannot now challenge the validity of the judgment upon that ground.

27. As a sovereign entity, the Blackfeet Indian Nation is entitled to enforce the underlying judgment within the territorial jurisdiction of the Blackfeet Indian Reservation. Ths Court affirms the sovereign authority of the Blackfeet Indian Nation to enforce the underlying judgment in reasonable and expeditious fashion. Assets are available, most clearly in the form of insurance proceeds, to satisfy the underlying judgment. The judgment has not been satisfied because Glacier Electric simply refuses to acknowledge the validity of the judgment and the sovereignty of the Blackfeet Indian nation.

28. Principles of estoppel, laches and wavier overcome the Co-op's arguments to the contrary. This Court will not allow the passage of time to excuse non-compliance with a Tribal Court Judgment. The delays in this case were caused by the Co-op's refusal to pay or post a supersedeas bond and its lengthy appeals.

29. The doctrine of judicial estoppel precludes a party from assuming a position in a legal action or proceeding which is inconsistent with one previously asserted, where the inconsistency would allow the party to benefit from its deliberate manipulation of the court. 28 Am. Jur.2d Estoppel and Waiver § 34. Judicial estoppel binds a party to his or her judicial declarations and precludes the party from a taking a position inconsistent with them in a subsequent action or proceeding. *Matter of George Trust*, 296 Mont. 56,

69, 986 P. 2d 427 (1999); *Fiedler v. Fiedler*, 266 Mont. 133, 139 879 P. 2d 675 (1994). The fundamental purpose of judicial estoppel is to protect the integrity of the judicial system. *Kauffman-Harmon v. Kauffman*, 307 Mont. 45, 2001 MT 238, 36 P. 3d 408, 412 (2001). "Sated simply, it is a rule which 'estops a party to play fast and loose with the courts.' " *Fiedler*, 266 Mont. at 140.

30. The decision of the Honorable Joseph Moran is upheld. The Plaintiffs shall be allowed to enforce their judgment from the assets on the reservation of the Defendant and its insurance carrier.

DATED this 13 day of March 2007.

/s/ Wanda M. Glazel]
Chief Justice

/s/ _____
Associate Justice

/s/ _____
Associate Justice

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX L

IN THE TRIBAL COURT
FOR THE BLACKFEET INDIAN RESERVATION

NO. 92-CA-269

[Filed August 26, 2003]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

ORDER FOR EXAMINATION OF JUDGMENT DEBTOR

It appearing by the verified Petition of Patrick F. Flaherty, attorney for Plaintiffs, and Judgment Creditors in the above-entitled action, that:

I.

Judgment was recovered in said action against the above Defendant on May 19, 1993, in the monetary amount of $1,382,181.60, punitive damages in the amount of $775,000, costs in the amount of $7,500.65, together with interest thereon at the rate of 7% per annum;

II.

That said Judgment was duly entered into the office of the Clerk of said Court, and that no part of this Judgment has been satisfied.

III.

No writ of execution upon the Judgment has previously been issued.

That said Judgment remains unpaid, and it is necessary for the Plaintiffs/Creditors, in aid of execution to exercise the Debtor to determine the availability of assets or insurance proceeds of the Debtor available for execution or to otherwise satisfy the judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED that Glacier Electric Cooperative, Inc., appear before the Tribal Court in the court room at the Blackfeet Tribal Courthouse, on the 14 day of October, 2003, at

10:00 a.m., and on such further days as I shall name to make discovery, under oath concerning his property; and said Judgment Debtor is hereby forbidden in the meantime from disposing of any of its property.

DATED this 20th day of August, 2003.

/s/
TRIBAL COURT JUDGE

cc: Patrick Flaherty
Jerry Lynch
Maxon Davis

APPENDIX M

IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION

CASE NO. 92-CA-269

[Filed May 19, 1993]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

* *

JUDGMENT

* *

This case having come on for trial with jury on April 13, 1993, and after consideration of the testimony presented and the documentary evidence introduced, the jury did, on April 29, 1993, return a Verdict, a copy of which is attached hereto and by this

reference made a part hereof. The Plaintiffs have submitted a Memorandum of Costs in accordance with Blackfeet Rule of Civil Procedure §40 which is proper and by reference made a part hereof.

The Defendants have asked for a hearing pursuant to §27-1-221(7)(c) M.C.A. wherein the Court would consider briefs and arguments regarding whether the award of punitive damages should be increased or decreased.

The Court has reviewed the record and finds that there are no legal or factual reasons to set aside the jury's verdict of punitive damages. The punitive verdict of $775,000 is proper considering the evidence presented and the jury's finding at Question No. 8 that the "Plaintiffs proved by clear and convincing evidence that Glacier Electric Cooperative, Inc. acted with actual malice or fraud so as to justify an assessment of punitive damages."

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiffs, Ron Bird, Herb Gilham and Scott Sherburne, Individually and on behalf of Glacier Construction, Inc., shall have judgment against the Defendant Glacier Electric Cooperative, Inc., and recover from it the sum of One Million Three Hundred Eighty-Two Thousand One Hundred Eighty-One and 60/100's Dollars ($1,382,181.60) for damages and the additional sum of Seven Hundred Seventy-Five Thousand Dollars ($775,000.00) for punitive damages for a total sum of Two Million One Hundred Fifty Seven Thousand One Hundred Eighty-One and

60/100's Dollars ($2,157,181.60) with interest thereon at the legal rate of interest until paid.

2. That pursuant to Rule 37(B), the Plaintiffs, Ron Bird, Herb Gilham and Scott Sherburne, Individually and on behalf of Glacier Construction, Inc., shall recover in addition to the Judgment from the Defendant Glacier Electric Cooperative, Inc., their costs in the amount of One Thousand and 65/100's Dollars ($1,000.65) ,with interest thereon at the legal rate of interest until paid.

3. That the costs of the jury in the sum of $ 4,625 ^{00} are awarded to the Plaintiff and recoverable from the Defendant. The Defendant shall pay the Clerk of the Blackfeet Tribal Court jury/court costs in the sum of $ 6,500 ^{00}.

DATED this 19 day of May, 1993.

/s/ Peter Sellars
TRIBAL COURT JUDGE

cc: Patrick F. Flaherty
Maxon R. Davis

APPENDIX N

**IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN
RESERVATION
BROWNING, MONTANA**

CASE NO. 92-CA-269

[Filed September 1, 1992]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
vs.	)
GLACIER ELECTRIC COOPERATIVE, INC.,	)
Defendant.	)

* *

ORDER DENYING DEFENDANT'S
MOTIONS TO DISMISS

* *

The Defendants have filed a Motion to dismiss Complaint dated August 10, 1992 which motion was suppported by a brief dated August 14, 1992.

Counsel for the Plaintiffs has filed an Answer Brief to the Defendant's Motion to Dismiss.

The Court having considered the law, the facts and the pleadings contained herein, hereby enters the following.

1. INSUFFICIENCY OF SERVICE OF PROCESS

Service of process on the Blackfeet Reservation is regularly made by certified mail. In this regard, Rule 12(c) allows anyone appointed by the Court to serve its complaints. The postmaster, as

* * *

where the Tribal Court had assumed jurisdiction and would be allowed the opportunity to determine its own jurisdiction.

Non-member litigants continually raise the argument that the Tribal Court forums are unfair, biased and incompetent. This exact argument was raised in the Iowa Mutual case and was soundly rejected by the Court. The Blackfeet Judicial System has progressed rapidly in recent years in their overall competency and possess a deep and abiding concern for assuring due process and equal protection of law to all litigants. The Tribal Court exercises basic fairness to all litigants. The Blackfeet Tribal Court System has a caseload of complex litigation equivalent to matters before State and Federal Court systems.

The issues of Civil Adjudicatory Jurisdiction in this matter is for the Blackfeet Tribal Court to decide. The Blackfeet Tribe and the Blackfeet Tribal Court retain civil adjudicatory jurisdiction over all matters of dispute arising within the exterior boundaries of the Blackfeet Indian Reservation. The Blackfeet Tribal Court must be allowed to make its own careful examination of tribal sovereignty, of its own Tribal Constitution and determine if the Tribe's sovereignty, relative to civil adjudicatory jurisdiction, has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

No court has ever ruled that Indian Tribes do not have civil jurisdiction per se over activities within the exterior boundaries of an Indian Reservation. This includes transactions between tribal members and non-Indians, which is the matter now before the

* * *

APPENDIX O

PAUL R. HAFFEMAN
DENNIS TIGHE
MAXON R. DAVIS
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
The Milwaukee Station, Third Floor
100 River Drive North
P.O. Box 2103
Great Falls, Montana 59403-2103
Telephone: (406) 761-5243
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CAUSE NO:
CV-08-30-GF-SEH-RKS

[Filed April 21, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
-vs-	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier	)

Construction, Inc.,)
)
Defendants.)
)

COMPLAINT FOR INJUNCTION AND DECLARATORY RELIEF

COMES NOW, the Plaintiff, Glacier Electric Cooperative, Inc., and for its Complaint for declaratory and injunctive relief, states and alleges as follows:

I. JURISDICTION

This action involves a federal question arising under the laws of the United States and is brought pursuant to 28 U.S.C. §1331 and is a case of actual controversy pursuant to 28 U.S.C. §2201.

II. GENERAL ALLEGATIONS

1. Glacier Electric Cooperative, Inc. (hereinafter, GEC) is a non-profit rural electric cooperative organized under the laws of the State of Montana and financed, in part, by the federal Rural Electric Administration and its successor, the Rural Utilities Service.

2. GEC has its principal place of business in Cut Bank, Glacier County, Montana, which is outside the Blackfeet Indian Reservation, and provides electrical service to members both on and off the Blackfeet Indian Reservation, and into Canada.

3. The Estate of Scott Sherburne is the successor in interest to Scott Sherburne, deceased. Mr. Sherburne was not an enrolled member of the Blackfeet Tribe.

4. Ron Bird is an individual and an enrolled member of the Blackfeet Tribe whose last known address is Browning, Montana on the Blackfeet Reservation.

4. Herb Gilham is an individual and an enrolled member of the Blackfeet Tribe whose last known address is Browning, Montana on the Blackfeet Reservation.

5. Glacier Construction, Inc. was a for-profit Montana corporation which was involuntarily dissolved in December, 1993. Its principal place of business at the time it was active was Browning, Montana, which is on the Blackfeet Indian Reservation.

6. For many years, Glacier Construction performed electrical line maintenance and construction work for GEC on an as-needed basis while under the ownership of Don Smith. The work involved doing pole "change outs"--replacing old power poles with new--and other tasks associated with maintaining the Co-op's electrical distribution system in Glacier, Pondera and Flathead counties. In 1991, Sherburne, Bird and Gilham purchased Glacier Construction from a local banker with no cash but simply an assumption of an outstanding loan. GEC had complained of inadequate work performance by Glacier Construction's crew prior to the acquisition, and those complaints continued together with concerns about liability exposure and untrained employees. In June, 1992 GEC canceled its

working relationship with Glacier Construction because of numerous concerns about deficiencies in the work performed by Glacier Construction's crew.

7. In July, 1992, Glacier Construction and the Defendants filed a Complaint in Blackfeet Tribal Court against GEC (Blackfeet Tribal Court cause number 92-CA-269). The Complaint alleged that when the Defendants agreed to purchase Glacier Construction in February, 1991, they did so in reliance on "promises" made by the previous owner and by GEC's general manager that the Co-op was planning extensive maintenance and construction work on its electrical line distribution system on the Blackfeet Indian Reservation, and that the Co-op would continue to work with Glacier Construction to accomplish such work. Further, the Complaint alleged that GEC broke its "promise" to employ Glacier Construction to maintain its power system by hiring a non-Indian contractor to do the work instead of hiring Glacier. Based on the foregoing allegations, the Complaint alleged five different causes of action: (1) breach of Tribal Employment Preference Ordinances ("TERO") and Blackfeet Constitutional provisions regarding economic self-determination; (2) breach of contract; (3) constructive fraud under § 28-2-406, MCA; (4) negligent misrepresentation; and (5) defamation under § 27-1-801, et seq., MCA.

8. GEC moved to dismiss the complaint on the grounds of (1) insufficiency of service of process; (2) lack of jurisdiction; (3) failure to state a claim for the individually named plaintiffs upon which relief can be granted; and (4) failure to state a claim for the corporate plaintiff upon which relief can be granted.

Additionally, GEC moved for the substitution of a non-Co-op member judge.

9. In September, 1992, the Honorable Pete Sellars, a non-attorney Blackfeet Tribal Judge, denied GEC's Motion for Substitution of Judge, and in a harshly worded order warned against the filing of such motions in the future. Judge Sellars also denied GEC's motions to dismiss.

10. In February, 1993, GEC filed a motion for summary judgment, based on a "forum selection clause" in a contract between GEC and Glacier Construction stating that any dispute between it and GEC would be heard in the Montana Ninth Judicial District Court. Judge Sellars denied the motion from the bench.

11. The tribal court trial was held in April, 1993, before a jury composed entirely of enrolled members of the Blackfeet Indian Tribe. Before the jury selection process began, the tribal court overruled GEC's objection that the all-Indian jury panel violated GEC's right to a representative jury, given that non-members comprise a substantial portion of the population on the reservation. The 13 day trial was plagued by numerous irregularities, and resulted in the tribal court jury returning a unanimous verdict in favor of Glacier Construction on all five causes of action. The jury also awarded damages totaling $2,157,181.60, including $1,382,181.60 in compensatory damages and $775,000.00 in punitive damages. Thereafter, GEC moved to stay entry of judgment pending the tribal court judge's review of the jury's punitive damage award. Without ruling on that motion, the tribal trial court judge signed a judgment making GEC

responsible for the entire jury verdict, plus roughly $10,000 in unspecified "costs of the jury" and "jury/court costs."

12. In June, 1993, GEC filed a timely Notice of Appeal to the Blackfeet Court of Appeals, as well as a motion to stay execution of the judgment pending the appeal. The tribal trial court judge initially granted a stay without requiring a bond, but later directed GEC to file a $2.25 million dollar surety bond which required the sureties to "submit to the jurisdiction of Blackfeet Tribal Court and agree to waive any objection to Tribal Court jurisdiction[.]" When GEC did not file such a surety bond, the tribal trial court judge issued an order lifting the stay. GEC moved the Blackfeet Court of Appeals to vacate that order, citing, in part, information that the tribal trial court judge's neutrality had been compromised by a personal financial conflict with GEC. In response, the tribal trial court judge issued an order fining GEC's counsel, and reprimanding and suspending them from practicing in Blackfeet Tribal Court for 90 days. After counsels' suspension had lapsed, GEC sought to recuse two of the three Blackfeet Court of Appeals justices hearing the appeal (all of whom are non-attorneys) due to conflicts of interest essentially identical to the tribal trial judge's. That motion was never decided. However, the Blackfeet Court of Appeals did issue a sua sponte "gag order" prohibiting the parties or their counsel from making comments "of any kind" to the media about the case, and warning that any violation would be punished with "unlimited action." GEC moved to have the gag order lifted as a violation of its right to free speech, but the motion was never decided, so technically it remains in effect now, some 14 years later.

13. In May, 1995, the Blackfeet Court of Appeals issued an order affirming the trial court judgment in all respects, except the assessment of $4,625.00 in "costs of the jury." Although holding that the tribal trial court erred in allowing the Plaintiffs in that action to pursue a tribal law claim for breach of Blackfeet TERO laws and constitutional provisions relating to economic self-determination, the Blackfeet Court of Appeals determined that error was "harmless."

14. GEC did not immediately satisfy the tribal court judgment. Therefore, in February, 1996 Sherburne, Bird and Gilham filed suit in U. S. District Court for the District of Montana, Great Falls Division (U. S. District Cause No. CV-96-022-GF-PGH) demanding that the Federal Court recognize and enforce the tribal court judgment as a matter of comity. In its defense of that action, GEC again raised the issue of Blackfeet Tribal Court jurisdiction, and violations of its fundamental due process rights. In an effort to prove lack of due process, during the course of that action GEC sought to depose a Helena private practice attorney who drafted the opinion signed by the Blackfeet Court of Appeals while simultaneously litigating Blackfeet Tribal Court cases involving the issue of tribal court jurisdiction, which issue was addressed in the tribal appellate court's decision. That effort was blocked at the request of the Blackfeet Tribal Business Council. After an adverse ruling at the District Court level, GEC appealed to the Ninth Circuit Court of Appeals.

15. In July, 2001, in the decision of *Ron Bird, et al. v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001), the Ninth Circuit Court of Appeals the

reversed the District Court and held that the tribal court proceedings deprived GEC of due process, and remanded to the District Court to grant GEC judgment and deny the relief requested by the Glacier Construction plaintiffs. The Ninth Circuit stated:

> Having concluded that the closing argument of Glacier Construction offended due process by its appeal to racial enmity and bias, we reverse the decision of the district court to recognize and enforce the tribal court judgment under principles of comity. The tribal court judgment may not be recognized and enforced because to do so would again violate the due process rights of the Coop.

Id. at p. 1152.

16. Notwithstanding the Ninth Circuit's holding in Bird, and despite there being a six year limitations period under tribal law for executing on Blackfeet Tribal Court judgments (see, Blackfeet Commercial Code, Chapter 2, Sec. 2A), in February, 2002, the Glacier Construction plaintiffs began proceedings in tribal court to execute on the then nine year old tribal court judgment, by demanding that GEC's manager, a non-member of the Blackfeet Tribe who lives and works off the reservation in Cut Bank, appear for a debtor's exam in Browning, and produce financial records and other documents which are maintained in the regular course of business off the reservation.

17. While GEC resisted those demands, both the Blackfeet Tribal Court and Blackfeet Court of Appeals have issued orders (usually prepared by the Glacier plaintiffs' lawyers) rejecting GEC's assertions, inter

alia, that: a) the six year limitations period for enforcing a 1993 judgment expired many years ago, b) the tribal courts have no jurisdiction to compel a non-tribal member residing off the reservation to appear in Browning with documents and information which is kept in the normal course of business outside the boundaries of the Blackfeet Reservation, (see Hormell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1090 (8th Cir. 1997) ("Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations")), and c) the tribal courts have no subject matter jurisdiction to hear the underlying action in its entirety pursuant to decisions such as Montana v. United States, 450 U. S. 544 (1981), Strate v. A-1 Contractors, 520 U.S. 438 (1997) and South Dakota v. Bourland 508 U.S. 679 (1993). In its latest decision, the Blackfeet Court of Appeals not only rejected GEC's appeal, but also sanctioned GEC by making it responsible for the Glacier plaintiffs' attorney's fees in defending the appeal. Thus, GEC has fully exhausted its tribal court remedies prior to filing the present action. Attached as Exhibits A through E are true and correct copies of the following documents from the tribal court proceedings: a) Blackfeet Tribal Court Order for Examination of Judgment Debtor dated August 20, 2003, b) Blackfeet Court of Appeals Decision & Order dated March 13, 2007, c) Blackfeet Tribal Court Order dated February 27, 2008, d) Blackfeet Tribal Court Order dated March 13, 2008, and e) Blackfeet Court of Appeals Motion (sic) dated April 7, 2008.

18. The most recent tribal court order prior to filing the present action was a Blackfeet Tribal Court order directing that GEC's manager appear for a debtor's

exam with the requested documents on Tuesday, April 22, 2008 in Browning. See Order Resetting Oral Argument dated April 11, 2008, attached as Exhibit F. The tribal court judge who issued that order also denied GEC's motion that he recuse himself from the proceedings due to conflicts of interest similar to that of the original trial court judge and appellate court justices.

III. COUNT ONE – INJUNCTION

19. The allegations contained in paragraphs 1 through 18 are incorporated herein.

20. On April 11, 2008, the Blackfeet Tribal Court issued an order requiring GEC to submit to a debtor's exam in Browning on April 22, 2008.

21. The GEC general manager, Jasen Bronec, does not reside on the Blackfeet reservation, and the GEC financial records and business documents he has been ordered to produce at the debtor's exam are not located on the Blackfeet Indian Reservation.

22. GEC assets located on the reservation consist of a field office and warehouse located in Browning and their content, rolling stock such as trucks and equipment used for maintenance and emergency purposes, 13 electrical substations, thousands of power poles and hundreds of miles of miles electric wire. Some of these assets, such as the field office, warehouse and substations, are located on land which is owned by GEC itself, while the vast majority of the remainder are located on rights-of-way on land alienated to non-Indians, such as the United States, the State of Montana and other persons and entities

who are not enrolled members in the Blackfeet Tribe. These on-reservation assets are used to provide service to the Blackfeet Tribe and enrolled members of the Blackfeet Tribe, as well as many persons or entities who are not enrolled members of the Blackfeet Tribe. Further, the use of such on-reservation assets is necessary to provide service off the reservation, including to both sides of two ports of entry on the U.S./Canadian border, and into Canada. Specific identification of these assets in a debtor's exam makes them available for execution and seizure by the Glacier Construction plaintiffs. Seizure and subsequent disruption of electrical service would harm the rights of non-parties and the public, both on the reservation and off and into Canada, who are dependent on Co-op electricity. Exhibit G, Affidavit of Jasen Bronec.

23. GEC has no adequate remedy at law or otherwise for the harm or damage caused by Defendants' action to compel the appearance of GEC's general manager and the production of off-reservation records. GEC has no other remedy because it has exhausted its Tribal Court remedies.

24. GEC will suffer irreparable harm, damage and injury unless the actions of the Defendants are enjoined. The harm includes but is not limited to (a) violation of GEC's due process rights, (b) a violation of the individual due process rights of GEC's general manager, and (c) potential disruption in service to the public, both on the reservation and off, in the event of seizure of utility assets.

25. It is reasonably likely that GEC will prevail on the merits because Defendants' demand for a debtor's exam directed at persons and GEC property located off

the reservation is an attempt to enforce the Tribal Court judgment off the reservation in direct violation of the Ninth Circuit Court of Appeals decision in Ron Bird, et al. v. Glacier Electric Cooperative, Inc., 255 F.3d 1136 (9th Cir. 2001). Furthermore, GEC is likely to prevail on the merits on its subject matter jurisdiction argument that the Tribal Court never had jurisdiction in the first place because the underlying dispute does not fall within either of the two Montana exceptions to the general rule that Indian tribes do not have jurisdiction over non-members of the involved tribe. See, Strate v. A-1 Contractors, 520 U.S. 438 (1997).

IV. COUNT TWO – DECLARATORY JUDGMENT

26. The allegations of paragraphs 1 through 25 are incorporated herein.

27. An actual controversy exists between GEC and Defendants because Defendants' actions conflict with the Ninth Circuit's decision in Bird, supra. Attempts to enforce the Tribal Court judgment off the reservation by compelling testimony and production of off-reservation documents violates the due process rights of GEC and its individual employees.

28. The Defendants' Tribal Court judgment is void because the Tribal Court did not have subject matter jurisdiction over the Glacier Construction business dispute.

WHEREFORE, Plaintiff prays for judgment as follows:

1. That the Court issue a preliminary injunction and permanent injunction enjoining Defendants from proceeding with a debtor's exam directed at persons, documents and property located off the Blackfeet Reservation.

2. That the Court enter judgment declaring the rights and legal relations of the parties regarding the due process rights of GEC and its employees.

3. That the Court enter judgment declaring that the Tribal Court judgment and all other orders of the Tribal Court are void because of a lack of subject matter jurisdiction.

4. For costs and expenses incurred herein.

5. For further necessary and proper relief as may seem just to the Court.

DATED this 21st day of April, 2008.

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

By /s/ Paul R. Haffeman
Paul R. Haffeman
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APPENDIX P

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CAUSE NO:

[Filed April 21, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff	)
-vs-	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier	)

Construction, Inc.,)
Defendants)
_____)

AFFIDAVIT OF JASEN BRONEC

STATE OF MONTANA)
: ss
County of Glacier)

JASEN BRONEC, being first duly sworn, upon his oath, deposes and says that:

(1) I am a citizen of the United States, a resident of Cut Bank, Glacier County, Montana, of legal age, and competent to be a witness. Further, I am the Manager of Glacier Electric Cooperative, Inc. (GEC), and am not an enrolled member of the Blackfeet Tribe. If called upon to testify, I could testify to the following, all of which are within my own personal knowledge.

(2) I have reviewed the factual allegations in the Complaint for Declaratory and Injunctive Relief, and the allegations appear to be true and accurate to the best of my information and belief.

(3) I have reviewed the list of financial records and related documents which the the Blackfeet Tribal Court has ordered me, in my role as Manager of Glacier Electric, to appear with and produce at a hearing to be held on the Blackfeet Indian Reservation. All of those documents and information are currently located off the Blackfeet Indian Reservation, either at Glacier Electric's headquarters in Cut Bank or elsewhere.

(4) Included among the documents which the Blackfeet Tribal Court has ordered me to produce are lists of GEC assets which are located on the Blackfeet Indian Reservation, upon which the Defendants in the present action, who are the Plaintiffs in Bird v. Glacier Electric Cooperative, Inc., Blackfeet Tribal Cause No. 92CA-269, are seeking to execute to pay a 15 year old Blackfeet Tribal Court Judgment which the Ninth Circuit Court of Appeals in Bird v. Glacier Electric Cooperative, Inc., 255 F.3d 1136 (9th Cir. 2001) has determined is unenforceable in federal court because GEC's right to due process was violated during the tribal court proceedings. Any such list of on-reservation assets would include GEC's field office and warehouse located in Browning and their content, rolling stock such as trucks and equipment, 13 electrical substations, thousands of power poles and hundreds of miles of electric wire. Some of these assets, such as the field office, warehouse and substations, is located on land which is owned by GEC itself, while the vast majority of the remainder are located on rights of way on land alienated to non-Indians, such as the United States, the State of Montana and other persons and entities who are not enrolled members in the Blackfeet Tribe. These on-reservation assets are used to provide electric utility service to the Blackfeet Tribe and enrolled members of the Blackfeet Tribe, as well as many persons or entities who are not enrolled members of the Blackfeet Tribe. The field office and its employees service local accounts of Tribal members and non-Tribal members on the reservation and off the reservation. The rolling stock and vehicles provide on-site maintenance and emergency service for Tribal members and non-Tribal members on and off the reservation. Further, GEC's use of such on-reservation assets is a necessary link

for providing service to individuals and businesses off the reservation, including to both sides of two ports of entry on the U.S./Canadian border, and into Canada.

(5) If the plaintiffs in Bird v. Glacier Electric Cooperative, Inc., Blackfeet Tribal Cause No. 92CA-269 use the information demanded in their debtor exam to execute on and seize GEC assets within the exterior boundary of the Blackfeet Reservation. irreparable harm will result to persons and businesses outside the reservation. It is not possible to estimate the damages that would result from an interruption in electrical service to an unknown number of customers for an unknown period of interrupted service. Loss of electric service and maintenance assets would seriously undermine GEC's ability to provide service both on and off the reservation. This would, in turn, cause considerable harm to the ability of schools, hospitals, governmental entities and others to provide essential services both on and off the reservation, and would interrupt commerce both on and off the reservation as well, and into Canada.

/s/ Jasen R. Bronec
JASEN BRONEC

SUBSCRIBED AND SWORN to before me this 18 day of April, 2008.

[Notarial Seal]

/s/ Janet Crocker
Notary Public for the State of Montana
Residing at Cut Bank, Montana
My commission expires: 6-14-2008

* * *

[Certificate of Service Omitted from Printing of this Appendix]

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 99-35162

[Filed October 19, 1999]

RON BIRD, individually and on behalf of Glacier Construction, Inc.; HERB GILHAM, individually and on behalf of Glacier Construction, Inc.; and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc.;

Plaintiffs/Counterdefendants/Appellees,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant/Counterclaimant/Appellant.

On Appeal from the United States District Court for the District of Montana, Great Falls Division, District Court Cause No. CV-96-022-GF-PCH

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Defendant/Appellant Glacier Electric Cooperative, Inc. ("the Co-op") submits this Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1 & 28(a)(1). The Co-op is a non-profit, member-owned cooperative. It neither has any parent corporation, nor does any publicly held company own ten percent or more of its stock.

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STATEMENT OF JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. § 1331. Because the district court entered a final judgment under Federal Rule of Civil Procedure 56, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The district court entered final judgment on January 22, 1999. [ER 93]. The Co-op filed its Notice of Appeal on February 3, 1999. [ER 94]. This appeal is therefore timely under Federal Rule of Appellate Procedure 4(a)(1).

ISSUES PRESENTED

1. Did the district court err in granting summary judgment to Appellees, thereby recognizing and enforcing a judgment of the Blackfeet tribal courts, where the record contained substantial evidence of due process violations in derogation of established principles of comity?

2. Did the district court err in its comity analysis by refusing to consider Appellant's extra-record evidence of systemic deficiencies in the Blackfeet tribal courts, thereby depriving Appellant of an opportunity to show that it could not have received due process in these courts?

3. Did the district court err in its comity analysis by refusing to allow Appellant to discover additional relevant evidence of both systemic deficiencies in the Blackfeet tribal courts, and irregularities unique to this case, thereby depriving Appellant of an

opportunity to show that it could not have received due process in these courts?

STATEMENT OF THE CASE

The judgment at issue in this appeal arose from a dispute over maintenance work for Appellant Glacier Electric Cooperative, Inc. ("the Co-op") on the Co-op's electrical distribution system, which is partly located on the Blackfeet Indian Reservation in northwestern Montana. In July 1992, Appellee Glacier Construction, Inc. ("Glacier") filed a complaint in Blackfeet Tribal Court alleging that the Co-op had violated state and tribal law by not continuing to employ Glacier to maintain the distribution system both on and off the Reservation. [ER 40-A, pp.5-7, ¶¶14-24].

In April 1993, trial was held before a lay tribal judge and an all-tribal member jury, which resulted in a verdict against the Co-op for $1,382,181.60 in compensatory damages and $775,000.00 in punitive damages. [ER 40-D]. The tribal court entered judgment against the Co-op for the amount of the verdict, plus various costs and interest. [ER 40-E]. The Co-op appealed the judgment to the Blackfeet Tribal Court of Appeals, which dismissed the tribal law claim but affirmed the judgment in most other respects. [ER 40-L].

Glacier then filed an action in federal court in February 1996, requesting that the district court "recognize, enforce and register" the tribal court judgment "so that execution may be issued thereon in the [f]ederal [c]ourt system." [ER 1, p.2]. Thereafter, the parties filed cross-motions for summary judgment

[CR 25 & 53] on the issue of tribal jurisdiction, which the district court resolved in Glacier's favor. [CR 62].

The district court then ordered the parties to submit briefs addressing what scope of review should be used to resolve the remaining questions concerning recognition and enforcement of the tribal court judgment. [CR 65]. In its briefs [CR 68 & 73], the Co-op argued that the district court should consider any relevant and admissible evidence -- including evidence outside the record -- in making its determination whether to recognize and enforce the judgment, and allow the Co-op the opportunity to conduct the discovery necessary to develop such evidence. The district court, however, decided that its review should be limited exclusively to the record before the tribal court [ER 75], and thus severely curtailed the Co-op's discovery efforts. [ER 61].

With respect to the merits of the enforceability issue, the district court granted summary judgment in favor of Glacier, holding that the tribal judgment was entitled to recognition and enforcement in federal court under applicable principles of comity. [ER 92 & 93].

The Co-op filed a timely Notice of Appeal. [ER 94].

STATEMENT OF FACTS

The genesis of this case is a business dispute between two Montana corporations. Glacier is a two-thirds Indian owned, for-profit construction company incorporated under the laws of the State of Montana, and located in the Town of Browning, Montana, within the Blackfeet Indian Reservation ("Reservation"). [ER

40-A, p.1, ¶1]. The Co-op is a non-profit rural electrical cooperative, also incorporated under Montana law, and headquartered in Cut Bank, Montana, outside the Reservation. [ER 40-A,p.2, ¶2]. The Co-op provides electricity to Montana residents living both on and off the Reservation. [CR 40, p.0011, ¶II].

Before 1991, the Co-op had contracted with Glacier's prior owner to do maintenance work on its electrical distribution system. [ER 40-A, pp.2-3, ¶¶4 & 6]. In March of 1991, the three individual Appellees[1] purchased Glacier, allegedly in reliance on certain "representations and statements" by the Co-op that it "would continue to do work with [Glacier] to maintain its power grid" into the future. [ER 40-A, pp.3-4, ¶¶6, 7 & 9].

In fact, the Co-op did maintain a business relationship with Glacier for some time after 1991, until it became concerned with the quality of Glacier's work. [CR 40, p.0080, ¶2]. As a result, the Co-op terminated the relationship. [CR 40, p.0081, ¶1].

Glacier filed a complaint in Blackfeet Tribal Court alleging that the Co-op had breached "its commitment to employ [Glacier] to maintain its power system," [ER 40-A, p.4, ¶10, ll.20-22], and that the Co-op was liable for actual and punitive damages under five legal theories: (1) breach of Tribal Employment Preference Ordinances ("TERO") and Blackfeet Constitutional

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[1] Ron Bird, Herb Gilham and Scott Sherburne are the stockholders of Glacier Construction. [ER 40-A, p.2, ¶3]. Unless otherwise indicated, the four Appellees will be collectively referred to herein as "Glacier."

provisions regarding economic self-determination; (2) breach of contract; (3) constructive fraud; (4) negligent misrepresentation; and (5) defamation. [ER 40-A, pp.5-7, ¶¶14-20].

The Co-op moved to dismiss the complaint on the following grounds: (1) lack of personal and subject matter jurisdiction; (2) insufficiency of service of process; and (3) failure to state a claim upon which relief could be granted. [CR 40, pp.0058-0062]. Additionally, the Co-op moved for the substitution of a non-Co-op member judge. [CR 40, pp.0091-0092]. The tribal judge denied both motions, and warned against the filing of substitution motions in the future. [CR 40, pp. 0093-0099; ER 40-B, p.3, l.28 through p.4, l.2].

The case went to trial on April 13, 1993. At the outset, the Co-op objected that the method used to obtain the list of eligible jurors excluded non-Indians, who comprised approximately one-fifth of the Reservation population. [ER 40-C]. The tribal court overruled that objection. [ER 89-A].

The sixteen day trial which followed was plagued by irregularities. For example, at Glacier's request, and over objection, the tribal judge took the jury to view the Co-op's facilities in Browning, which is on the Reservation, and in Cut Bank, which is off the Reservation. [See ER 89-F]. During this trip, jurors were "interacting with all the lawyers and [Co]-op employees all along the way . . . . Asking questions . . . . And with [Glacier] also." [ER 40-M, 11(depo p.41, ll.19-22)]. The court reporter, hired entirely at the Co-op's expense, attempted to transcribe all the discussions between and amongst jurors, witnesses, and parties, but was unsuccessful. [See ER 89-F; ER

40-M, p.10 (depo p.37, ll.17-23)]. Evidentiary demonstrations were performed, the judge got lost, and statements were made outside the presence of the judge and/or some jurors. [ER 40-M, pp.3-6 (depo pp.12-23) & pp. 8-11 (depo pp.32-42)]. In closing argument, Glacier's counsel revealed that this jury view was meant to show the inequalities between the Co-op's on- and off-Reservation facilities, which reflected the disparity with which the Co-op allegedly treated tribal members and non-members. [ER 89-I].

On April 29, 1993, the jury returned a verdict totaling nearly $2.1 million dollars in favor of Glacier on all five counts of the complaint. [ER 40-D]. The Co-op moved to stay entry of judgment pending the judge's review of the jury's punitive damage award. [CR 40, pp.0160-0167]. Without ruling on the motion, the tribal judge instead signed a judgment making the Co-op responsible for the entire jury award, plus $1,000.65 in "costs" claimed by Glacier; unspecified "costs of the jury" in the amount of $4,625.00; unspecified "jury/court costs" of $6,500.00; and interest. [ER 40-E].

On June 2, 1993, the Co-op filed a Notice of Appeal [CR 40, pp.0174-0180] to the Blackfeet Tribal Court of Appeals, along with a Motion to Stay Execution of the Judgment pending the appeal. The tribal court initially granted a stay without requiring an appeal bond [CR 40, p.0181], but subsequently directed the Co-op to file a $2.25 million dollar surety bond which required the sureties to "submit to the jurisdiction of Blackfeet Tribal Court and agree to waive any objection to Tribal Court jurisdiction[.]" [CR 40, p.0183, ¶5]. When the Co-op did not immediately submit a bond, Glacier moved to lift the stay. The

tribal court granted the motion without explanation. [CR 40, p.0184].

The Co-op moved to vacate the order lifting the stay, in part out of concern that the tribal judge's neutrality had been compromised by a personal financial conflict of interest with the Co-op. [ER 40-F]. By affidavit submitted with its motion, the Co-op described its recent discovery that the judge had an "extremely poor" payment history on his Co-op accounts. [ER 40-G, p.2, ¶3]. While presiding over the Co-op's case, he received twenty disconnect notices for nonpayment of his residential electric bills, which resulted in his services being disconnected at least once. [ER 40-G, pp.2-3, ¶¶5-7]. The Co-op again raised the judge's possible bias in its opening brief to the Blackfeet Court of Appeals filed September 20, 1993. [CR 40, pp.0204-0346].

In apparent[2] response, the trial judge ordered the Co-op's counsel to attend a hearing to show cause why they "should not be disciplined for [alleged] professional misconduct." [ER 40-H]. Counsel appeared as ordered, and requested an explanation of the charges and an opportunity to present evidence in their defense. [ER 40-I, p.6, ll.6-13]. However, the judge denied both requests, and instead read a previously-prepared Order of Reprimand and Suspension under which counsel was fined and suspended from practicing in Blackfeet tribal court for

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[2] In his Notice to Appear, the tribal judge included other allegations of misconduct, in addition to criticizing the Co-op's Motion to Lift the Stay of Execution. Thus, the Co-op cannot affirmatively state that the Notice was in direct response to said motion.

ninety days. [ER 40-I, p.2, l.23 to p.6, l.5; ER 40-J, p.3, ¶2].[3]

After its counsels' suspension had lapsed, the Co-op sought to recuse two of the three Blackfeet Court of Appeals lay justices hearing the appeal due to conflicts of interest essentially identical to the trial judge's. [CR 40, pp.0394-0412]. Shortly thereafter, the appellate court issued a *sua sponte* "gag order," prohibiting the parties and their "agents, employees and attorneys . . . from making any comments of any kind" to the media/press regarding the appeal. [ER 40-K, ¶1]. The order warned that any violation of its terms would be treated as contempt, and would be punished with "unlimited action." [ER 40-K, ¶2]. The Co-op moved to have the gag order lifted on the grounds that it violated free speech rights -- not to mention the fact that the Co-op had not discussed the appeal with the media so as to warrant the order -- but that motion was never decided and the appeal proceeded.

Ultimately, the appellate court affirmed the trial court judgment with only two exceptions. First, the appellate court struck from the judgment the lower court's assessment of $4,625.00 of "costs of the jury." [ER 40-L, p.29]. Second, the appellate court held that the trial court erred in allowing Glacier to pursue a tribal law claim for breach of Blackfeet TERO laws and constitutional provisions relating to economic self-determination. [ER 40-L, p.13, ¶2]. Nonetheless, the

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[3] See CR 40, pp.0348-0375 for all documents relating to the Order of Reprimand, including contradictory orders staying, then lifting, and otherwise addressing counsels' suspension.

appellate court concluded such error was harmless. [ER 40-L, p.13, ¶2].

Glacier then filed an action in federal district court seeking to register and enforce the tribal judgment. [ER 1]. The Co-op counterclaimed for a declaration that the tribal judgment was void and unenforceable under principles of comity, and requested an injunction against further enforcement efforts. [ER 3].

In an effort to illustrate to the federal district court why it should not extend comity to the tribal court judgment, the Co-op sought to depose Ross Cannon [CR 13], a non-Indian Montana attorney hired by the tribe as a law clerk and believed to have authored the opinion denying the Co-op's tribal appeal. [See ER 75, p.2, n.1]. During the time he was assisting the appellate justices, Cannon was also serving as plaintiff's counsel in at least one tribal court case[4] involving a dispute over tribal court jurisdiction (an issue in the Co-op's appeal), and, as Chief Justice of the Blackfeet Supreme Court, had authored an opinion on tribal jurisdiction.[5] Cannon also wrote letters [ER 24] requesting a favorable ruling on jurisdiction to the presiding judge in Sollars, who at the same time was one of the appellate court justices hearing the Co-op's appeal.

Neither Cannon himself nor Glacier objected to the Co-op deposing Cannon. However, the Blackfeet tribe's

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[4] Sollars v. Montana State Dep't of Transp., Blackfeet Cause No. 90-CA-229.

[5] Wilson v. Marchington and Inland Empire Shows, Inc., Blackfeet Cause No. 93-BSC-02.

governing body, the Blackfeet Tribal Business Council ("BTBC"), moved to intervene in the action to quash the deposition. [ER 17]. Although denying the Motion to Intervene, the district court prohibited the Co-op from deposing Cannon, or any other member of the Blackfeet tribal court system. [ER 61, p.6, ¶1].

Despite being thus limited in discovery, the Co-op developed and submitted other evidence concerning deficiencies in the Blackfeet court system which could not have been evident from the record in this case. Such evidence included a 1992 report on the Blackfeet tribal court system commissioned by the BTBC and prepared by the National Indian Justice Center, which described that system as "struggling in terms of funding stability and personnel training" and plagued by outside influences, including political pressure from the BTBC itself. [ER 83, pp.7, 24 & 28]. Findings from the report were echoed in an affidavit the Co-op obtained from a former Blackfeet Court Advisor. [ER 40-N].

However, the district court refused to consider extra-record evidence that shed light on systemic deficiencies in the Blackfeet tribal court, or concerning due process violations specific to the tribal proceedings at issue. [ER 75]. Instead, it decided the question of enforcement based exclusively on the tribal court record. In this appeal, the Co-op challenges not only the district court's ultimate decision with regard to recognition and enforcement of the tribal court judgment, but also the means by which the district court reached that decision.

SUMMARY OF ARGUMENT

This case involves an effort to use the power of the federal courts to enforce a multi-million dollar judgment originating out of a system not subject to the constraints of the United States Constitution. Admittedly, foreign courts are not required to "utilize judicial procedures identical to those used in the United States Courts" before judgments emanating therefrom will be recognized and enforced. Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997). However, simply because federal courts should avoid engaging in "unnecessary judicial paternalism," id., does not mean they can turn a blind eye on the fundamental injustices that may occur in foreign courts. Comity requires that the "basic tenets of due process" be complied with, or else "the judgment will not be recognized by the United States." Id. Here, the record clearly reflects that the Co-op was denied due process through all stages of the Blackfeet tribal court proceedings. Moreover, had the district court permitted, the Co-op would have developed evidence showing problems with the Blackfeet judicial system affecting that system's ability to provide the Co-op fundamental fairness. When reviewing the institutional deficiencies existing in the Blackfeet court system, coupled with the objective manifestations of those deficiencies that occurred in the Co-op's tribal court proceedings, it is clear the Blackfeet legal system could not provide for the fair and impartial administration of justice in this case, thereby rendering the tribal judgment unenforceable in this Court.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. Balint v. Carson City, ___ F.3d ___, No. 96-17342 (9th Cir. June 14, 1999) (en banc). This Court's review is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(c). Meade v. Cedarapids, Inc., 164 F.3d 1218, 1221 (9th Cir. 1999). This Court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Balint, ___ F.3d at ___.

The district court's order excluding evidence in the context of summary judgment is reviewed for an abuse of discretion. Kennedy v. Collagen Corp., 161 F.3d 1226, 1227 (9th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1577 (1999). The district court's decision to exclude extra-record evidence is reviewed for an abuse of discretion. Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996). A district court may abuse its discretion if it does not apply the correct law. Beech Aircraft Corp. v. United States, 51 F.3d 834, 841 (9th Cir. 1995) (reviewing exclusion of expert testimony).

This Court reviews the district court's rulings concerning discovery for an abuse of discretion. See Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999). Whether information sought by discovery is relevant may, however, involve an interpretation of law that is reviewed de novo. See Cacique, Inc. v. Robert Reiser & Co., Inc., 169 F.3d 619, 622 (9th Cir. 1998) (state law).

ARGUMENT

This Court recently held that "the recognition and enforcement of tribal judgments in federal court[s] must inevitably rest on the principles of comity." Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997). This Court further observed that "[i]n synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments." Id. at 810. However, this Court also identified two circumstances under which it is "mandatory . . . for a district court to reject a tribal judgment," id. at 812; "(1) the tribal court did not have both personal and subject matter jurisdiction, or (2) the defendant was not afforded due process of law." Id. at 810.

In this appeal, the Co-op argues it was denied due process throughout the course of the proceedings in Blackfeet tribal court and therefore, pursuant to Wilson, the tribal judgment must not be recognized and enforced.[6] Guided by Hilton v. Guyot, 159 U.S. 113, 202-03 (1895), this Court articulated the factors due process encompasses in the context of comity. Those factors are: (1) the opportunity for a full and fair trial (2) before an impartial tribunal (3) that conducts the trial upon regular proceedings (4) after proper service or voluntary appearance of the defendant (5)

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[6] In district court, the Co-op argued that lack of jurisdiction also applied so as to require non-recognition of the tribal court judgment. [See CR 53]. However, except to the extent that jurisdictional issues are part of comity's due process analysis, see *infra* n. 7, the Co-op abandons its position on that issue.

without a showing of prejudice in the tribal court or in the system of governing laws. Id. at 811. Moreover,

> evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."

Id. (quoting Restatement (Third) of Foreign Relations Law of the United States [hereafter Restatement (3d)] § 482 cmt. b (1986)).

The tribal court proceedings at issue here fell far short of the requirements of due process. The tribal court record reflects every one of the constitutional deficiencies this Court warned against in Wilson. Furthermore, there is abundant evidence that the Blackfeet court system suffers from infirmities that directly compromised the Co-op's ability to secure "the guarantees of due process [which] are vital to our system of democracy." Id. By overlooking the obvious deficiencies reflected in the tribal court record, by refusing to permit discovery into other tribal court irregularities, and by declining to consider overwhelming evidence of deficiencies in the Blackfeet court system revealed in extra-record sources, the district court erred by recognizing and enforcing the multi-million dollar judgment Glacier obtained in Blackfeet tribal court. In short, while it should have balanced the important interests embodied in notion of comity, the district court ignored one of those interests: "'the rights of its own citizens . . . who are

under the protection of its laws.'" Id. at 810 (quoting Hilton, 159 U.S. at 164).

I. THE RECORD DEMONSTRATES THAT THE CO-OP WAS DENIED DUE PROCESS IN TRIBAL COURT.

In reviewing the record, it is clear that the tribal court proceedings satisfied none of this Court's due process requirements. The Co-op was denied due process in those proceedings from start to finish, as set forth sequentially below.

A. Glacier did not properly serve the Co-op.

One of the requirements of due process is "proper service [upon] or voluntary appearance of the defendant," Wilson, 127 F.3d at 811, so as to ensure personal jurisdiction over that defendant. See Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 n.2 (1995).[7] Here, the Co-op was neither properly served nor did it voluntarily appear.

In order to vest the Blackfeet tribal courts with personal jurisdiction over a corporate defendant like the Co-op, a licensed process server must *physically* deliver the complaint and summons to that defendant on the Reservation. Blackfeet Tribal Law

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[7] Although lack of personal jurisdiction is a separate and distinct basis for mandatory rejection of a foreign judgment under Wilson, this Court has noted that "lack of personal jurisdiction, itself, has a due process aspect to it." Pahlavi, 58 F.3d at 1410 n.2. Accordingly, lack of personal jurisdiction, as established through improper service of process, Burnham v. Superior Court of Cal., 495 U.S. 604, 616-17 (1990), is properly considered under Wilson's due process analysis.

and Order Code of 1967 ("Blackfeet Code"), Ch. 9, Rules 12(A) & (D)(4). There are no provisions in the Blackfeet Code for service of process by mail.

Despite this requirement, Glacier mailed the summons and complaint to the Co-op's office in Cut Bank, Montana, off the Reservation. The Co-op objected to this improper method of service in its initial tribal court appearance[8] and again before the tribal appellate court. [CR 40, pp.005 & 0238-0242]. The appellate court agreed with the Co-op's contention that "service by mail is *not* contemplated by the [Blackfeet] code," and stated that it "does not condone service having been made in this fashion." [ER 40-L, p.7] (emphasis added). Yet the appellate court went on to hold that it was "harmless" error for Glacier not to have followed tribal law, because the Co-op "did receive a copy of the summons and complaint and did, thereby, receive notice of this action and the opportunity to respond." [ER 40-L, p.7].

To the contrary, it does make a difference whether service of process requirements are followed, regardless of actual notice. Although "technical" service of process laws may be liberally construed when actual notice is shown, "The goal of liberal construction 'cannot be utilized as a substitute for the plain legal requirements as to the manner in which service of process may be had.'" 4A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure (2d)

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[8] The Co-op did not "voluntarily appear" in the tribal court action. Instead, as correctly depicted by the district court, the Co-op "entered a special appearance . . . for the purpose of filing, *inter alia*, a motion to dismiss for lack of jurisdiction" and insufficiency of service of process. [CR 62, p.9].

§ 1083 (1987 & Supp. 1999) (quoting United States v. Mollenhauer Labs, Inc., 267 F.2d 260, 262 (7th Cir. 1959)). Thus, a defendant *must* be served pursuant to applicable rules of law for a court to secure personal jurisdiction; actual notice is not enough where the plain legal requirements of the law are not followed. Id. at n.5 (providing lengthy list of cases supporting proposition that regardless of actual knowledge, terms of service of process rules must be complied with or else action is subject to dismissal, and citing no authorities to the contrary).

Here, the tribal appellate court found that Glacier failed to adhere to the plain legal requirements of tribal service of process rules. [ER 40-L, p.7]. This failure was not "harmless." Rather, it was a fundamental error on a threshold issue which deprived the tribal court of the power to adjudicate any claim whatsoever against the Co-op. Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (holding it is fundamental that courts must resolve jurisdictional issues before deciding a case on the merits, for "jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is [to announce] the fact and [dismiss] the cause") (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

B. The jury was empaneled on the unconstitutional basis of race.

Chapter 1, section 6 of the Blackfeet Code specifically limits the persons eligible for jury service to: "Male and female Blackfeet Indian residents of the Reservation between the ages of 21 to 65." [ER 40-R, p.3]. This provision expressly excludes non-Indians, or

non-Blackfeet Indians,[9] from the class of eligible jurors, in violation of due process.

In effect, the provision excludes on the basis of race a group who comprises almost one-fifth of the Reservation population. According to a 1990 census, of the 8,549 people living on the Reservation, 1,524 [1,542] were non-Indians and 7,025 were Blackfeet Indians. Montana Dept. of Commerce's 1990 Census of Population & Housing, Pub. L. No. 94-171. Accordingly, approximately 18% of the people residing on the Reservation are non-Indians, prohibited from serving on a Blackfeet court jury.

The United States Supreme Court has held that discrimination on the basis of race in selecting a jury in a civil proceeding violates the Fifth Amendment's Due Process Clause, which guarantees equal protection.[10] Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 616 & 618-19 (1991) (acknowledging

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[9] Inexplicably, there are two different versions of this code provision. One version of Chapter 1, § 6 limits persons eligible for service on a jury to: "Male and female *Indian* residents [.]" In another version, the word "Blackfeet" appears between "female" and "Indian." [ER 40-R, p.3]. It is impossible to know which version of the Blackfeet Code is correct. However, the point remains: non-Indians living on the Reservation are improperly excluded from jury service.

[10] The Indian Civil Rights Act (ICRA), modeled after the United States Constitution, similarly prohibits a tribal court from denying equal protection of its laws and due process to any party subject to its jurisdiction. 25 U.S.C. § 1302, ¶ 8. As such, ICRA is to be interpreted in light of federal constitution case law. Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978).

"over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process"); Powers v. Ohio, 499 U.S. 400, 402 (1991) ("[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts").

The Supreme Court has stated repeatedly that "a member of the community may not be excluded from jury service on account of his or her race." Powers, 499 U.S. at 407-08 (citing cases dating as far back as 1880). Contrary to this basic tenet of constitutional law, that is exactly what happened here. The Co-op was forced, over objection, to plead its case before an all-Indian jury because the Blackfeet Code improperly excludes members of the community from jury service solely on the basis of race, in clear violation of the equal protection and due process rights guaranteed under ICRA and the Fifth Amendment.

The Co-op suffered greatly as a result of the improper composition of the tribal court jury. Glacier seized the opportunity to exploit the racial sensitivities of an all-Indian jury by making inflammatory allegations that the Co-op was prejudiced not only against the individual Appellee-Indians and their business, but Indians in general. See *infra* at 36-37. Turning a business dispute into a racially charged case before a racially stacked jury adversely affected the Co-op's opportunity for a fair trial before an impartial tribunal. Comity cannot extend to enforce a judgment resulting from such prejudicial proceedings.

C. The trial judge's impartiality was at risk, and he was unable to provide the Co-op fair or regular proceedings.

1. The trial judge's impartiality was threatened by conflicts of interest.

A "necessary component of a fair trial is an impartial judge." Weiss v. United States, 510 U.S. 163, 178 (1994). "It is basic to the concept of due process in the Constitution that a judge be impartial. . . . A civil case in which a judge has the opportunity to make law favorable to his [or her] own case results in an unconstitutional judgment." Boddy v. Guerrero, 179 F.3d 714, 716-17 (9th Cir. 1999).

The concept of judicial impartiality is "ancient." Davis v. Xerox, 811 F.2d 1293, 1294 (9th Cir. 1987). That a judge cannot be a judge in his or her own case has been elevated to a constitutional principle such that due process is violated when a judge is "permitted to try cases where he has an interest in the outcome," because "even the probability of unfairness" must be prevented. *In re* Murchison, 349 U.S. 133, 136 (1955); see also *In re* Honolulu Consol. Oil Co., 243 F. 348, 351 (9th Cir. 1917) ("[A] judge is disqualified in any litigation where he has any certain, definable, pecuniary, or proprietary interest which will be directly affected by the judgment that may be rendered.") (citation omitted).[11]

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[11] This concept is also embodied in the ABA Model Code of Judicial Conduct, Canon 3E(1) (1990): "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a

For purposes of comparison, federal judges must disqualify themselves in situations such as those described in 28 U.S.C. § 455, where their impartiality could be affected. 28 U.S.C. § 455(b)(4) provides that federal judges must disqualify themselves if they have "a financial interest in the subject matter in controversy or in a party to a proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

"Financial interest" is statutorily defined as "ownership of a legal or equitable interest, however small." 28 U.S.C. § 455(d)(4). Accordingly, holding stock in a corporation which is a party to a lawsuit mandates the disqualification of a judge. See Honolulu Consol., 243 F. at 351; Gaer v. Bank of Baker, 107 P.2d 877, 879 (Mont. 1940); Anno., Disqualification of Judge Because of His or Another's Holding or Owning Stock in Corporation Involved in Litigation, 25 A.L.R. 3d 1331, 1334 (1969).

Membership in a cooperative is no different since by definition, a cooperative is owned by its members.[12]

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party or a party's lawyer, . . .[or] (c) the judge knows that he or she . . . has an economic interest in the subject matter in controversy [.]"

While the Code of Judicial Conduct, as well as federal statutes discussed herein, do not bind tribal courts, they nonetheless provide models that tribal courts should follow to ensure their judgments are recognized and enforced in United States courts because an impartial judge is so basic to due process.

[12] A cooperative is "'an enterprise or organization owned by and operated for the benefit of those using its services.'" Public Utilities Reports, Inc., *Electric Cooperatives: On the Threshold of a New Era* 3 (1996) (hereinafter *Cooperatives*) (quoting Webster's

In Pahl v. Witt, 304 S.W.2d 250 (Tex. 1957) and Dark Tobacco Growers' Cooperative Association v. Wilson, 267 S.W. 1092 (Ky. 1925), the trial judges were disqualified from deciding cases where cooperatives of which they were members were parties. See also 46 Am.Jur.2d *Judges* § 113 & n.32 (1994) and 48A C.J.S. *Judges* § 121 (1981) (both noting judge who is member in cooperative that is a party to case over which judge is asked to preside should be disqualified). Cooperative members "are in very much the same situation as stockholders in a corporation," having an ownership interest in the organization which could affect their impartiality. Pahl, 304 S.W.2d at 252. Under such circumstances, disqualification is a must, because "[a]n independent, unbiased, disinterested, fearless judiciary is one of the bulwarks of American liberty, and nothing should be suffered to exist that would cast a doubt or a shadow of suspicion upon its fairness and integrity." Id. (quotation omitted).

Here, the Co-op was denied the "independent, unbiased, disinterested" judge to which it was entitled. At the outset, the Co-op moved to substitute a non-Co-op member to preside over the case, because members of the Co-op owned and controlled the organization, and as such, had an inherent financial and proprietary interest in the outcome of the case. Under these circumstances, fairness dictated that any Co-op member judge appointed to hear the case be

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Dictionary (1883)); see also Black's Law Dictionary 334 (6th ed. 1990) (defining "cooperative" as an association organized for purpose of rendering services "to shareholders or members who own and control it").

disqualified, either *sua sponte* or on the Co-op's motion.[13]

The tribal judge did not disqualify himself, despite his Co-op membership. Instead, he reprimanded the Co-op for "challeng[ing] [] the integrity and competence of the entire Blackfeet Tribal Court system." [ER 40-B, p.2, ll.12-13].

Financial interest is not the only circumstance mandating a federal judge's disqualification. A judge "shall disqualify himself in any proceeding in which his [or her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a); see also ABA Model Code of Judicial Conduct Canon 3E(1) (1990), *supra* n. 11. The United States Supreme Court has held that a judge should be disqualified in any situation "'which would offer a possible temptation to the average . . . judge . . . not to hold the balance nice, clear and true.'" Murchison, 349 U.S. at 136 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)). While such a rule may be "stringent," it is nonetheless necessary because "'justice must satisfy the appearance of justice.'" Id. (quoting Offutt v. United States, 348 U.S. 11, 14

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[13] It has also been noted that a judge's status as a utility customer may be sufficient to warrant disqualification. 13A Wright, Miller & Cooper, Fed. Prac. & Proced. (2d), § 3547 & n.9 (1984) (quoting E. Thode, Reporter's Notes to Code of Judicial Conduct, 66-67 (1973) (stating that a judge's relationship to a party as a public or private utility customer is sufficient to disqualify that judge "if the outcome of the proceeding could substantially affect his interest as a customer of the utility"). See also New Orleans Public Serv., Inc. v. United Gas Pipe Line Co., 719 F.2d 733 (5th Cir. 1983); *In re* New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794 (10th Cir. 1980).

(1954)); see also Davis, 811 F.2d at 1294-95 (noting rule "operates not merely to bar the judge who is actually incapacitated from judging by virtue of his bias but to eliminate the judge who might be tempted to go from the harmless to the dangerous and the judge who appears to the public at large, although he is not, venal.").

In addition to his general status as a Co-op consumer-member which warranted his disqualification, the tribal judge's own situation with the Co-op cast serious doubt on his impartiality, and made an even stronger case for his disqualification. During the proceedings at issue, he received twenty disconnect notices, and service was actually disconnected at his residence, for his failure to pay his bills. Shortly after the trial, his wife complained to the Co-op's manager "that she felt she and her husband were receiving unfair treatment from the Co-op." [ER 40-G, p.3, ¶8]. At the very least, these events would surely tempt the average judge "not to hold the balance nice, clear and true." Tumey, 273 U.S. at 532.

Whether the tribal judge actually harbored a personal bias against the Co-op as a result of his troubled account history is irrelevant, for merely the "probability of unfairness" demanded his disqualification. Murchison, 349 U.S. at 136. The judge should have perceived the appearance of impropriety under these circumstances. His failure to properly recuse himself does not measure up under due process scrutiny. See, e.g., Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (holding judge's refusal to disqualify himself violated appellant's due process rights where, regardless of actual interest or bias, appearances raised concern about his impartiality).

2. The trial judge lacked the professional training and skills necessary to ensure the Co-op received a fair trial.

Like most judges of the Blackfeet judiciary, the presiding trial judge was a lay person with no formal legal training. [See ER 40-N, p.2, ¶8].[14] As a result, he "lack[ed] the necessary knowledge in the principles of either civil or criminal law." [ER 40-G, ¶¶7-8]. See also National Indian Justice Center's Blackfeet Tribal Court System: Court Review Report, Oct. 1992,[15] [ER 83] p.24, ¶3 (noting that the judge was not law school trained, nor did he have "sufficient specialized training to effectively carry out [his] judicial responsibilities"). The judge himself has admitted, "We [tribal court judges] need more training, there's no question." [ER 83, p.41].

"In courts where untrained, unqualified tribal members sit as judges, . . . the rights of the parties are often flagrantly violated." C. Small, Justice in Indian Country 56 (1980). See also S. Brakel, American Indian Tribal Courts–The Cost of Separate Justice 77 (1978) [hereafter Brakel] (commenting after personal

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[14] Attorney Robert Olson has been licensed to practice in Blackfeet tribal court since 1984 [ER 40-N, p.1, ¶3], and served as a Court Advisor to the same court in 1992. [ER 40-N, p.2, ¶4]. His observations of the Blackfeet tribal court are set forth by affidavit, included at ER 40-N.

[15] In 1992, the Blackfeet Tribal Business Council contracted with the National Indian Justice Center (NIJC) to review and evaluate tribal court operations and procedures, and provide a formal report of its findings and recommendations. [ER 83, p.4]. The results were contained in the NIJC report, included at ER 83.

observation of the Blackfeet tribal court in session: "With little experience or training . . . tribal judges are generally unable to bring balance to, or maintain control over, proceedings."). The Third Circuit has described the "dangers inherent in entrusting an untrained lay judge with the power to declare with finality legal rights, duties, or burdens" as follows:

> A judge devoid of training in the complexities of the law, the subtleties of legal reasoning, or the methodology of legal research may tend to decide each matter according to personal predilection or assumption. The command of statutes and the teachings of precedents may well be ignored in such a process. Moreover, such errors may go uncorrected unless de novo review is available, since lay judges do not sit on courts of record.
>
> Recent empirical studies have borne out these observations. . . . [N]onlawyer judges "tend to tilt the delicate standard of due process away from individual defendants."

Lecates v. Justice of the Peace Court No. 4, 637 F.2d 898, 910-11 (3d Cir. 1980) (footnotes and quotation omitted).[16]

Unfortunately, this "tilting" is exactly what happened in the Co-op's tribal case, as the trial judge's lack of training affected the Co-op's ability to receive a fair trial in several ways. For instance, the judge did

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[16] In an effort to protect against these dangers, the ABA Model Code of Judicial Conduct, Canon 3B(2) (1990), requires that "[a] judge shall . . . maintain professional competence in [the law]."

not have a command of basic rules of evidence or civil procedure. He allowed Glacier's witnesses to express numerous inflammatory opinions to the effect that the Co-op's decision to not continue working with Glacier was racially motivated. See *infra* at 36-37. His rationale for overruling the Co-op's repeated objections to such testimony was that everyone "has a right to an opinion." [ER 89-D, p.3, l.9]. As a result of such rulings, the trial of this business dispute quickly deteriorated into an emotionally charged case about alleged racial prejudice, in which the Co-op was at a distinct disadvantage. In this regard, the tribal court proceedings were analogous to those described by the dissent in Burlington Northern Railroad Co. v. Red Wolf, 106 F.3d 868, 872 (9th Cir. 1997) (Kleinfield, J., dissenting), where the emotionally charged remarks of a tribal appellate judge compromised due process.

The tribal court's lack of experience and training were witnessed by the court reporter the Co-op retained to transcribe the proceedings.[17] For example, during the trial, the lay judge asked the reporter for advice on procedural issues. [ER 40-M, p.6 (depo p.22, ll.2-11)].

For comity to be afforded this tribal court judgment, the Co-op must have had its case heard by a competent judge who understood and applied legal concepts, thereby ensuring proceedings that comported

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[17] As the reporter explained, the Blackfeet court has no court reporter. Instead, the clerk of court simply runs a tape recorder and writes long-hand summary minutes of case proceedings. [ER 40-M, p.2 (depo p.7, l.24 to p.8, l.7)]. See also ER 83, pp.35-37 (discussing tribal court's "reporting system" and problems therewith).

with the requirements of due process. Where the presiding judge lacks legal training, "there is substantial room for error." [ER 83, p.24, ¶1)]. As the Third Circuit has recognized, ""The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise (the system). . . . Such justice is not justice at all. It is unequal, uncertain and capricious.'" Lecates, 637 F.2d at 910, n.22 (quoting Smith, The Justice of the Peace System, 15 Cal. L. Rev. 118, 127-28 (1927)).

Recognizing the constitutional concerns raised by trials before lay judges, the Supreme Court has held that defendants' due process rights are violated unless they are afforded an opportunity for a trial *de novo* in a court presided over by a lawyer-judge. North v. Russell, 427 U.S. 328, 334 (1976). Under the Blackfeet system, there is no right to a *de novo* review on appeal, and even if there were, none of the tribal appellate court justices are lawyers. While this arrangement may be adequate for "minor courts" which adjudicate "claims and disputes arising amongst members of the tribe," see Blackfeet Const. art. VI, § 1(k) [ER 40-Q, p.3], problems will inevitably arise when such courts take jurisdiction over complex litigation involving millions of dollars against non-tribal members, because the system is simply "not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms." North, 427 U.S. at 336, n.5.

D. The trial was conducted in such a way as to deny the Co-op due process.

The trial itself was conducted in such a manner as to deny the Co-op due process. As just one example, throughout the course of the trial, jurors were allowed to interact with witnesses, parties, lawyers and others. The court reporter noted that the jury was not properly sequestered, as he observed them intermingling with the parties, witnesses, the public, and court staff. [ER 40-M, pp.5-6 (depo p.20, l.7-18 through p.21, l.2)].

This improper intermingling was rampant during the "jury view" the tribal court granted, over objection, at Glacier's request. The jury view was perhaps the most glaring due process violation plaguing this trial. The afternoon of the sixth day of trial, jurors were transported to: (1) the Co-op's on-Reservation offices and warehouse, (2) isolated pole locations off U.S. Highway 89, and (3) the Co-op's warehouse, headquarters and switchyard off-Reservation. [ER 89-F]. The field trip involved not only the jurors' visual examination of those locations, but also their listening to discussions from people at those locations in the form of unsworn testimony, much of which the court reporter was unable to record.

The court reporter described the situation:

Q: Can you describe the conditions that existed on the field trip as it related to your ability to report what was occurring?

A: Well, I will tell you the worst one.

Q: Okay.

A: The one that I described being east of the highway in the Two Medicine area, where we were near this power line, the wind was blowing horribly. And at first I tried to record outside my car, and I couldn't do it. There were two factors that were real hard. The wind was blowing so hard, it was hard to hear; but my paper was all over the place. So I laugh, because this is–It was a rather funny thing, when I think about it.

I tried to get in the back seat of my car, as I recall, roll down the window and kind of sitting at a bit of an angle, with my machine in my lap, and the people talking, kind of shouting at me through the window, I tried to record what was being said.

Q: Now, were you able to hear everything that was being said by the witnesses?

A: No. . . .

. . .

Q: Where was the jury located when you were in the back seat of your car . . .?

A: Well, I remember them being rather scattered out. Maybe an area of 25 yards or so. There was more than just one person talking. There was several activities going on at the same time.

. . .

Q: . . . Was there actual witness testimony given during the course of the field trip?

A: Well, I would call it statements. I don't remember anybody being put under oath during the field trip, nor do I remember anybody being reminded that they were still under oath, having testified previously in the courtroom. . . .

[The] bulk of it was narrative form. I believe there were some questions and answers, by not only attorneys, but, I believe, jurors.

Q: Jurors were asking questions?

A: I remember a couple of times. And I also remember witnesses asking other witnesses questions.

. . .

Q: . . . [W]ere you able to physically report all the discussions that took place among the jurors, for example, out in the field?

A: No.

Q: Were you able to report all of the exchange that took place between the witnesses and the lawyers and the court?

A: No.

. . .

Q: Now, was the jury situated at the switchyard so that they could hear everything that was being said by everyone that was talking?

A: No. For instance, . . . some of the jurors weren't even in the building when [the grid system] was being explained. Some of them

were in another part of the building. Some were outside. Some were inside. I don't see how they could have all heard it.

. . .

Q: [D]id any demonstrations take place during the course of the field trip?

A: . . . [P]hysically, I remember, and I believe it was one of the plaintiffs, climbing . . .an electric pole. . . . At the switchyard, there were demonstrations of flipping various switches . . .

Q: . . . [W]as there any way that you could physically put down in writing what was going on during these demonstrations?

A: No. In fact, I don't believe I even was able to record what the gentleman who climbed the pole said.

[ER 40-M, pp.3-5(depo p.12, l.9 through p.18, l.1)].

. . .

Q: . . . [D]o you remember anything happening to the judge on part of the field trip?

A: Oh, I think he got lost . . . and we waited and waited and waited.

. . .

Q: Is it your recollection that there may have been some statements or other remarks made outside the presence of the judge?

A: I'm pretty sure there was.

[ER 40-M, p.6 (depo p.22, l.14 through p.23, l.2)].

In addition to the problems self-evident from the reporter's depiction, the field trip had other problems, not least of which was the fact that the judge exceeded his jurisdiction by taking jurors off the Reservation. The Blackfeet Code, and the judge's powers thereunder, are expressly limited to territory within Reservation boundaries: "The [Blackfeet Code] is a Code . . . to be administered within the [] boundaries of the Blackfeet Reservation of Montana." Blackfeet Code, Preface ¶1. This principle is not unique to tribal courts, but is a fundamental premise of the American legal system.

Courts have held that actions taken by judges outside their statutorily prescribed territories are "nullities" that require invalidation of judgments, based on lack of jurisdiction. In O'Daniel v. Inter-Island Resorts, Ltd., 377 P.2d 609 (Hawaii 1962), the trial judge permitted a jury view of an accident scene on another island outside the judge's statutorily prescribed territory. The Hawaii Supreme Court stated that the view could not be seen as a mere "irregularity," but as an error that "so violated traditionally understood and generally accepted fundamental principles as to render the trial [and judgment] void."[18] O'Daniel, 377 P.2d at 616 (lists

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[18] Although the Co-op repeatedly objected to the field trip, the rule against out-of-district proceedings is so fundamental and important that the Co-op need not have done so. Once it has been shown that a court has conducted proceedings beyond its own jurisdiction, with or without objection, or even by agreement of the parties, the ensuing judgment is rendered invalid. See Eichoff v. Caldwell, 151 P. 860 (Okla. 1915) (cited in O'Daniel, 377 P.2d at

cases); see also Anno., Place of Holding Sessions of Trial Court as Affecting Validity of its Proceedings, 18 A.L.R.3d 572, §6[a] (1968).

For the reasons discussed above, the tribal judge's permitting a field trip off the Reservation constituted fundamental error because he had no jurisdiction under the Blackfeet Code to conduct any portion of the trial beyond the boundaries of the Reservation. Because he acted beyond his jurisdiction, this trial was not conducted "on regular proceedings," as this Court requires. See Wilson, 127 F.3d at 811. The judgment of the Blackfeet trial court should be voided for lack of jurisdiction and therefore, the judgment cannot be recognized or enforced by this Court.

In addition to being legally improper, the field trip was unnecessary and irrelevant; constituted "undue delay [and] waste of time;" and as such should not have been allowed. Fed. R. Evid. 403. Glacier's counsel represented that the jury view was needed to show the jury where Glacier picked up equipment and interacted with Co-op management. [ER 89-C, p.2, ll.3-8]. However, these issues were undisputed and irrelevant to the real issue in the case, that is, whether the Co-op properly terminated Glacier under the law. The field trip shed no light on this issue.

Moreover, the field trip interjected an element of prejudice into the case that denied the Co-op due process. The real reason Glacier wanted the field trip was revealed in closing argument:

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615 & 617 (also noting court should raise issue on its own motion if parties do not)).

> [R]ecall they didn't want you to go see your Co-op in Cut Bank [off-Reservation]. Recall that we kept asking for the field trip. Objection. We don't need to do it. We don't need to do this. You don't want this. We don't want you. Even this might not be intentional malice. Today it's a functional prejudice that's built in. When you go from humble little Browning and the little dinky Co-op here, there's no drive-in, and you saw the big shop in Cut Bank, you saw the nice warehouse and all the accoutrements [sic] that go with a million dollar shop that's paid for by at least 70% of the income and the money and earnings that are coming from Browning to go over to Cut Bank . . . .

[ER 89-I, p.2, l.20 to p.3, l.8]. [See also ER 89-H, p.2, ll.13-23 (testimony of Floyd "Bob" Jarvis concerning disparities between facilities)].

The trial judge also allowed Glacier's counsel to elicit irrelevant, incompetent and unfairly prejudicial opinion testimony from various witnesses throughout the course of direct examination and over the Co-op's repeated objections -- testimony designed to further incite the all-Indian jury against what the witnesses portrayed as a racist Co-op. See testimony of: David Azure [ER 89-B, p.3, ll.21-22] ("They didn't want an Indian contractor working basically on the reservation [.]"); Scott Sherburne [ER 89-D, p.2, ll.23-24] ("[The Co-op] didn't want an Indian owned business working."); Ron Bird [ER 89-E, p.2, l.21 to p.3, l.5] (depicting Co-op's stereotyping him as a drunk); Merle "Jeep" McGee [ER 89-G, p.3, ll.8-11] ("I felt that [the Co-op] was discriminating against me."); and Bob Jarvis [ER 89-H] (discussing his study on race

relations between Co-op's off- and on-Reservation operations).

This opinion testimony either had nothing to do with the dispute being litigated, and/or comprised pure speculation and personal opinion. Either way, it violated provisions of the Blackfeet Code (see Ch. 1, §§ 3H & 3I (admissibility of oral testimony)), and Federal Rules of Evidence 401 (relevance), 403 (prejudice), 601-602 (competence), & 701-703 (opinion testimony), and further contributed to the irregular and unfair proceedings to which the Co-op was subjected.

E. The punitive damages portion of the judgment cannot be enforced.

At the conclusion of trial, the jury awarded Glacier over $2.1 million dollars, more than one-third of which -- $775,000.00 -- was for punitive damages, a "penalty" the tribal court imposed against the Co-op under the authority of Chapter 2, Section 3 of the Blackfeet Code.[19] However, this portion of the verdict is not entitled to recognition, both by its very nature as a foreign-assessed penalty, and in light of the absence of due process in the manner in which it was assessed.

Although foreign judgments generally are entitled to recognition if comity principles are satisfied, this Court has identified two "often stated exceptions" to this rule. Her Majesty, Queen in Right v. Gilbertson, 597 F.2d 1161, 1163 (9th Cir. 1979). The exception

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[19] That section of the Blackfeet Code states that "[wh]ere injury has been deliberately inflicted, the judgment may also include an additional *penalty* upon the defendant [.]" [ER 40-R, p.5]

applicable here is that United States courts do not enforce judgments for the collection of taxes, fines or penalties imposed by foreign courts. Id. (refusing to enforce Canadian judgment for back taxes against United States citizen); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1964); see also Restatement (3d) § 483; Mont. Code Ann. § 25-9-602(1) (1999) (defining "judgment" in Uniform Foreign Money Judgments Recognition Act to exclude tax or penal judgments).[20] Consequently, the penal portion of the tribal jury's award cannot be recognized or enforced.

Alternatively, the lack of due process inherent in the manner in which the punitive damages were awarded makes this award unenforceable. Since the nineteenth century, all federal and state courts (except Oregon) have reviewed the size of punitive damage awards. Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 426, 427-28 (1994) (invalidating Oregon's practice). Such judicial review is "one of the few procedural safeguards" providing against "the danger of arbitrary deprivation of property" which punitive damages pose. Id. at 432. Denying judicial review of a jury's punitive damage assessment violates the Due Process Clause of the Fourteenth Amendment. Id.

Montana law specifically addresses the proper scope of review a court should employ when considering a jury's punitive damage award.[21] Section

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[20] The other exception is the lack of reciprocity. Gilbertson, 597 F.2d at 1163.

[21] Montana law is of particular application to this issue as the tribal judge here expressly instructed the jury to assess punitive

27-1-221(7)(c) of the Montana Code requires the trial judge to consider the award in light of nine factors; determine whether to modify the award; and then "clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors." The language of this statute makes it clear that the reviewing court must independently consider both the propriety of awarding punitive damages and the amount of the award.

It is doubtful whether the tribal judge here conducted any review of the jury's $775,000 punitive damage award, let alone a thorough one. Although the judge indicated he had reviewed "the record" concerning the jury's assessment of punitive damages, [ER 40-E, p.2, l.4], that "record" was not available when he entered judgment just eight days after the verdict, which was weeks before the trial transcript was prepared. As this Court well knows, review without the record has little meaning in the context of affording a defendant due process. Moreover, the judge did not request briefs or oral argument on the issue.

To the extent he did conduct a review, the tribal judge did not follow the tenets of the law on which he instructed the jury: he did not "clearly state his reasons" for allowing the award to stand, or demonstrate he considered each of the factors set forth in section 27-1-221(7)(c) of the Montana Code. Instead, he merely "rubber stamped" the punitive damages

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damages in accordance with the same, notwithstanding his disregard thereof as discussed *infra*.

award. Nowhere does the tribal judge indicate he independently found enough evidence of the Co-op's "deliberate infliction" of injury against Glacier, i.e., actual fraud or malice, to justify both the imposition and amount of a "penalty" under the applicable Blackfeet Code provision [Ch. 2, § 3] or Montana law. Even the tribal appellate court concluded that it "may have been better" for him to follow state law in his review process [ER 40-L, p.27], although that court did not reverse or remand the punitive damages award. This type of cursory review was a denial of the Co-op's procedural due process.

F. The appellate proceedings were improper.

Due process violations continued in the Blackfeet Tribal Court of Appeals. Like the trial judge, the tribal appellate justices refused to acknowledge the conflict of interest they had both as members of the Co-op and as consumers who had experienced problems with their accounts. See *supra* at 21-27. When the Co-op moved to disqualify the appellate judges on the basis of those conflicts, the justices at first ignored the motion, and then denied it months later from the bench. As with the trial judge, the justices' failure to avoid even the appearance of partiality violated due process. *In re* Murchison, 349 U.S. 133, 136 (1955).

However, the most flagrant due process violation at this level occurred when the tribe employed Ross Cannon. Cannon's role in the appeal became known to the Co-op only after it attempted to conduct discovery. In response, the BTBC moved to intervene to prevent inquiry into what it deemed the "inner workings of the Blackfeet tribal court system." [CR 17: proposed Motion to Quash, p.1]. In its motion, the BTBC

identified Cannon as an appellate court "law clerk" who "performed functions which are intimately related to, or which amount to an integral part of, the judicial process," [id.], including discussing cases, performing legal research, and assisting the court in drafting its opinions. [ER 17, p.3, ¶3].

Under these circumstances, the due process violation could not be more patent, because Cannon had glaring conflicts of interest: He (1) regularly practiced law in the Blackfeet tribal court system, and (2) was in fact handling tribal court cases involving disputes over tribal court jurisdiction (an issue in the Co-op's appeal) both as a plaintiff's attorney and as Chief Justice of the Blackfeet Supreme Court.

Cannon served as plaintiff's counsel in Blackfeet Tribal Court Cause No. 90-CA-229, Sollars v. State of Montana Department of Transportation, a case arising out of an automobile accident in which he sought to impose tribal jurisdiction over a non-Indian. The presiding judge in that case was Donald Dupuis, who was also one of the three justices considering the Co-op's appeal. In the months leading up to the issuance of the tribal appellate court's opinion in this case on March 30, 1995, when Cannon was working closely as a law clerk with Justice Dupuis and the other justices, Cannon was writing letters to Judge Dupuis regarding Sollars on February 26 and 28, 1995, and on March 10, 1995, requesting -- ultimately with success -- that Dupuis rule in Cannon's clients' favor on the jurisdictional dispute. [ER 24]. Given the closeness of these dates, clearly there is a genuine issue of material fact as to the real nature of Cannon's role at the tribal court.

Further, during the time he was representing the plaintiff in Sollars, and while the Co-op's case was proceeding through Blackfeet tribal court,[22] the BTBC appointed Cannon to the position of Chief Justice of the Blackfeet Supreme Court. In that capacity, he authored that court's 1994 opinion in Wilson v. Marchington and Inland Empire Shows, Inc., Blackfeet Cause No. 93-BSC-02, which upheld the power of tribal courts to assume jurisdiction over actions involving non-tribal members. The Wilson decision is one of the leading Blackfeet appellate court decisions addressing the issue of tribal jurisdiction (albeit one this Court invalidated in Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997)).

The appearance of impropriety in this arrangement -- let alone the actual inappropriateness -- is obvious when considering that an attorney who is a law clerk for lay appellate court justices is allowed to practice law in that *same* court system, and advocate the *same* legal issues that are under consideration by justices for whom he is clerking. This is especially true when the judge to whom the attorney is advocating (i.e., in Sollars) is one of the same justices for whom he is clerking.

The impropriety of such an arrangement is obvious from this Court's Rule 46-5, which provides: "No former employee of the court shall participate or assist, by means of representation, consultation, or otherwise, in any case that was pending in the Court

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[22] The Co-op's appeal to the Blackfeet Tribal Appellate Court spanned from 6/23/93, when the Co-op filed its Notice of Appeal, until 5/30/95, when the appellate court rendered its decision.

during the employee's period of employment." If a *former* law clerk is strictly prohibited from participating in a case pending while he or she was clerking, it is even more egregious for a *present* law clerk to advise his or her judge on an issue where the clerk is also appearing before that judge as an advocate in another matter. To say the least, this arrangement does not satisfy the appearance of justice, which due process requires.

II. General infirmities plaguing the Blackfeet tribal court system compromised the Co-op's due process rights.

One of the key elements of due process under a comity analysis is that a defendant have an opportunity for a full and fair trial "under a *system* of jurisprudence likely to secure an impartial administration of justice . . . and [that] there is nothing to show [] prejudice . . . in the *system* of laws under which [the particular court] was sitting [.]" Hilton v. Guyot, 159 U.S. 113, 202-03 (1895) (emphasis added). Similarly, the Restatement (3d) provides that federal courts may not recognize a foreign judgment if the judgment "was rendered under a judicial *system* that did not provide impartial tribunals or procedures compatible with due process of law [.]" Restatement (3d) § 482(1)(a) (emphasis added); see also cmt. b (noting comity's due process is not satisfied where there is evidence which "would support a conclusion that the legal *system* was one whose judgments are not entitled to recognition").

Thus, in determining whether to recognize and enforce a judgment, a reviewing court must take into account the foreign judicial "system" as a whole, as

well as the particular record underlying the judgment being reviewed. Such a review enables the federal court to make an informed decision about the propriety of recognition and enforcement in a given instance. By scrutinizing the judicial *system* from which a given judgment emanated, the reviewing court can determine whether the foreign court was likely to have afforded the fundamental ingredients of civilized jurisprudence and basic due process, and that no structural or other irregularities in the system affected that system's ability to produce fair and impartial results. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 417 (1964) ("To make such an investigation significant, a court would have to discover not only what is provided by the formal structure of the foreign judicial system, but also what the practical possibilities of fair treatment are."). In so doing, federal courts ensure they do not perpetuate injustices occurring in extra-constitutional court systems affecting United States citizens.

This Court has confirmed the propriety of a review not confined solely to a foreign court record in a given case. See, e.g., Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995).[23] Other federal courts have held similarly. See, e.g., Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919, 923 (D. Mont. 1988), *vacated*, 708 F. Supp. 1561 (1989) (considering matters outside tribal record to conclude that non-member litigant in tribal court had been met "not only with

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[23] Although in this case, the district judge ruled that Pahlavi is distinguishable as it pertains to "unique circumstances" in Iran, [ER 75, p.8, ¶1], he clearly interpreted that decision too narrowly since other courts engaged in a comity analysis have examined systems other than Iran's. E.g., Wilson, 127 F.3d 805.

bias and uncooperativeness, but with a blatantly arbitrary denial of due process").

The district court in this case improperly limited its consideration to the tribal court record alone. It prohibited the Co-op from conducting discovery intended to document for evidentiary purposes the problems inherent in the Blackfeet tribal court system, claiming such "inquiry would undermine the integrity" of that system and comprise "an intrusion into the inner workings of the tribal court system." [ER 75, p.9].

By denying the Co-op even the *opportunity* to establish systemic deficiencies in the tribal court, and refusing to consider evidence the Co-op had already gathered, the district court abused its discretion. It failed to weigh the relevant factors when it did not follow the requirements set forth in Hilton and Wilson, which clearly anticipate evidence regarding systemic deficiencies in foreign courts. The district court's exclusion of this important evidence prevented it from accurately determining whether such systemic deficiencies affected the Co-op's due process rights.[24] "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States,

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[24] The district court's holding would have been even more problematic had not the Co-op hired a qualified court reporter to create the record on which the district court exclusively relied. It would be untenable to argue that the district court would have an adequate basis to undertake a proper comity analysis had it relied on the record, which consisted solely of a tape recording and the clerk's hand-written notes. This logistical issue further demonstrates the significance of considering evidence outside the record.

518 U.S. 81, 100 (1996); see also Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 (9th Cir. 1999).

A. The tribal judiciary is dominated by the tribal government.

The Blackfeet tribal judiciary is dominated by the Blackfeet Tribal Business Council (BTBC), the only branch of Blackfeet tribal government. See Blackfeet Constn. & By-Laws, Art. III, § 1 ("The governing body of the Blackfeet Tribe shall consist of a council known as the [BTBC]."). Under Blackfeet law, there is no separation of powers or system of checks and balances, concepts so fundamental to the form of government in this country. See generally Clinton v. Jones, 520 U.S. 681, 699-700 (1997) (providing general discussion of these principles).

As a result, the BTBC controls all functions of tribal government, including the judiciary that it created [CR 17: proposed Motion to Quash, p.1] pursuant to its authority to "establish minor courts for the adjudication of claims or disputes arising amongst members of the tribe." [ER 40-Q, p.3]. Judicial independence is thus jeopardized, as "tribal council members sometimes interfere with the decision making process of the courts." [ER 83, p.28, ¶2). As a former Blackfeet Court Advisor noted, "[T]he most significant institutional disability affecting the Blackfeet Tribal Court system is that all Tribal Judges serve at the pleasure of the [BTBC], which has repeatedly replaced Judges who have fallen in[to] disfavor with counsel [sic] members." [ER 40-N, p.3, ¶11, ll.15-19].

Tribal judges are appointed by the BTBC, which can and does reverse tribal court decisions. Consequently, there is sometimes pressure from the BTBC to rule a certain way. Even according to the judge presiding over the Co-op's tribal trial, "Council members will interfere, especially before an election when they're trying to get more votes." [ER 83, p.40]. Another tribal court judge complained that the BTBC "think[s] we're just another program they can control." [ER 83, p.40].

According to the NIJC's study of the Blackfeet judiciary done in 1993 -- the year the Co-op's case was being tried -- "Often, influences outside the court system (especially council pressures) provide undue burdens to the decision making process of the court. [J]udges often bend to these pressures." [ER 83, p.24, ¶ 2)]. In essence, then, it is the BTBC which dictates what the law is on the Reservation, rather than the judiciary. This scheme is in derogation of the centuries-old principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The United States Supreme Court has found that while some overlap between the branches of government is permissible,"'where the whole power of one department is exercised by the hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.'" Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting The Federalist No. 47, pp. 325-26 (J. Cooke ed. 1961)). Moreover, this Court has expressly included political dominance of the judiciary among the grounds for non-recognition of tribal

judgments, because an independent judiciary is absolutely essential to the bedrock notions of justice and fair play to which the phrase "due process" refers. Wilson, 127 F.3d at 811.

Certainly as a quasi-sovereign government, the Blackfeet tribe is free to exist under a system wherein "the whole power" of tribal government is exercised by the BTBC. See, e.g., National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 857 (1985) (requiring federal courts to give tribal legal institutions "proper respect"). However, recognition and enforcement of Blackfeet tribal judgments in federal courts is frustrated when the tribe attempts to impose such a system on non-member defendants such as the Co-op, because the system denies such defendants the built-in due process protection of an independent judiciary. See generally Ward v. Monroeville, 409 U.S. 57, 60 (1972) (finding violation of due process where defendant was tried in system where executive and judicial powers were united in presiding judge, whose impartiality was thus threatened). This Court's landmark decision in Wilson v. Marchington mandates that the power of the federal government not be used to perpetuate this denial of due process: "We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes." Wilson, 127 F.3d at 811.

B. Other problems inherent in the Blackfeet court system deprived the Co-op of due process.

Much has been said and written about the deficiencies of the Blackfeet judicial system, both by outside observers and those within the system. For

instance, one former Blackfeet Court Advisor relayed by affidavit problems he observed with the judiciary, including: (a) *ex parte* contacts with the judicial authorities; (b) bias against non-Indian litigants; (c) the use of an out-of-date and seriously incomplete tribal code, copies of which themselves are hard to obtain; (d) reliance on unwritten and largely unknown "tribal customs and usages" as the basis for judicial decisions; and (e) the attempted reliance on such "customs and usages" as the basis for what would otherwise be viewed as arbitrary and/or capricious decisions by courts. [ER 40-N, pp.3-5, ¶¶10-14]. Given all these deficiencies, coupled with the judiciary's dominance by the BTBC, the ex-Advisor characterized the Blackfeet judicial system as "so inherently flawed that it cannot nor could not at any time since 1984 provide any litigant with any assurance that his or her case will be resolved on the merits [.]" [ER 40-N, p.5, ¶14, ll. 9-11].

These and other findings were independently verified by the NIJC report the BTBC commissioned. That report described the Blackfeet tribal court system as one which "operates in an inefficient manner, lacking clear organizational and administrative control and direction." [ER 83, p.17]. The report noted the prevalence of *ex parte* communications [ER 83, p.26], and also intimated that justice is compromised due to "the failure of the key roles of [the] court system to apply the law evenly and reasonably." [ER 83, p.24].

The report included comments from one BTBC member/lawyer characterized the "entire [Blackfeet tribal court] system" as "broke, it's wrong, it has failed." [ER 83, p.40]. Documents appended to the report described the tribal court system as chronically

underfunded, swamped with nearly 8,000 cases per year on a reservation with only 4,000 people. [ER 83, p.41]. According to the tribal judge presiding over the Co-op's trial, "You get what you pay for." [Id.].

Problems with the tribal court system were so pervasive that in December 1994, the BTBC considered a plan to temporarily shut down the entire system, lay off all the judges and court personnel, and start over from scratch. [See ER 40-O]. However, that plan was never implemented after the tribal court personnel filed suit in tribal court–through one of Glacier's attorneys–against the BTBC seeking "injunctive relief to protect [them] from intimidation, corruption, and illegally losing their jobs." [ER 40-P].[25]

The above sources confirm there were a myriad of reasons why the Blackfeet tribal court system could not provide fundamental fairness to the Co-op. The underfunded, overworked, untrained, politically dominated judiciary simply lacked the resources or the know-how to do so in a structure which unintentionally created barriers to due process.

CONCLUSION

Based on *de novo* review of the record, this Court should conclude that the district court erred in determining, under principles of comity, that there was insufficient evidence of due process violations that

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[25] The Co-op recognizes that the sources cited in this paragraph would require verification by deposition, written discovery, or other methods before being formally admissible. However, the federal district court here denied the Co-op the opportunity to do so. [ER 61].

would preclude recognition and enforcement of the tribal court judgment in federal court. Moreover, this Court should conclude that the district court abused its discretion when it misinterpreted the law and thereby precluded the proffered extra-record evidence of systemic deficiencies in the Blackfeet tribal courts. This Court's comity analysis requires that such evidence be considered in determining whether the Co-op received due process in the Blackfeet tribal court. Finally, upon a *de novo* review of the law on whether discovery should have been permitted to put all relevant factors regarding foreign courts before the district court during its comity analysis, this Court should conclude that the district court abused its discretion by prohibiting such discovery.

Consequently, this Court should reverse Judge Hatfield's order recognizing and enforcing the Blackfeet tribal court judgment.

DATED this 19th day of October, 1999.

DAVIS, HATLEY, HAFFEMAN & TIGHE, PC

BY/s/Tiffany B. Lonnevik
Tiffany B. Lonnevik
Attorneys for Defendant / Appellant

* * *

[*Certificate of Service and Certificate of Compliance Omitted from Printing of this Appendix*]

STATEMENT OF RELATED CASES

There are no other cases pending in this Court which are related to the case at bar.

DATED this 19th day of October, 1999.

DAVIS, HATLEY, HAFFEMAN & TIGHE, PC

BY /s/
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APPENDIX R

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IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION, BROWNING, MONTANA

Cause No.: 92CA-269

[Filed February 25, 2002]

SCOTT SHERBURNE, RON BIRD, and HERB GILHAM, Individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
vs.	)

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant.

PLAINTIFFS' PETITION FOR ORDER TO ENFORCE AND AID IN THE EXECUTION OF JUDGMENT

COME NOW the plaintiffs in the above-entitled action, Scott Sherburne, Ron Bird, and Herb Gilham, individually and on behalf of Glacier Construction, Inc., and petition the Court to enter an appropriate order enforcing the monetary judgment entered in the above-referenced civil action on May 19, 1993. In support of their Petition, the plaintiffs state as follows:

A. Procedural History:

This action was tried before the above-entitled Court, sitting with a jury, commencing on April 13, 1993. On April 29, 1993 the jury, having been properly instructed upon the controlling issues of law, returned a Special Verdict in favor of the plaintiffs and against the defendant, Glacier Electric Cooperative. Inc. (See Attachment "A"). In answer to special interrogatories, the jury ultimately entered an award of compensatory damages in favor of the plaintiffs, and against the defendant, Glacier Electric Cooperative, Inc. ("Glacier Electric Co-op"), in the amount of $1,382,181.60. In addition, the jury entered an award of punitive damages in favor of the plaintiffs, and against Glacier Electric Co-op, in the amount of $775,000.

On May 19, 1993, this Court, the Honorable Pete Sellars, presiding, entered a Final Judgment upon the jury verdict in accordance with Sec. 3, Chap. 2. of the Blackfeet Tribal Law and Order Code of 1967 (as amended). Judgment was entered in a total amount of monetary sum of $2,157,181.60, with interest accruing thereon at the rate of seven percent (7%) per annum, as allowed by Sec. 47, Chap. 11, of the Blackfeet Tribal Law and Order Code, together with costs in the amount of $7,565. (See Attachment "B").

Upon appeal, the Court of Appeals for the Blackfeet Indian Reservation affirmed the judgment in the amount of $1,389,557.20. (See Attachment "C"). The only portion of the judgment vacated by the Appellate Court was that portion of the judgment awarding the plaintiffs the "costs of the jury" in the sum of $4,625.

With the mandate of the Court of Appeals entered on May 30, 1995, the Judgment, as modified by the Court of Appeals, is fully enforceable within the exterior boundaries of the Blackfeet Indian Reservation. To date, the Judgment has not been satisfied by the defendant, Glacier Electric Co-op, in any respect, thereby necessitating the assistance of the Court in enforcing the judgment through appropriate orders and writs of execution in accordance with Chap. 2, Part I. Sec. 6A of the Blackfeet Tribal Law and Order Code. (See Attachment "D," Affidavit of plaintiffs' counsel).

In order to insure the Judgment is satisfied by the defendant, Glacier Electric Co-op, in orderly and expeditious fashion, the plaintiffs respectfully request the Court to oversee enforcement of the Judgment through appropriate orders allowing execution upon

the assets of the defendant. Glacier Electric Co-op, located within the boundaries of the Blackfeet Indian Reservation. Accordingly, the plaintiffs pray for the following relief.

B. Relief Requested:

1. Proceedings in Aid of Execution:

The Judgment, at issue, was entered in accordance with Chap. 2, Sec. 1 of the Blackfeet Tribal Law and Order Code. Accordingly, execution upon the Judgment is controlled by Chap. 2, Sec. 6A of the Code, which incorporates, by reference, Secs. 33, 34, 35, and 41 of Chap. 10 of the Code. Included in the remedies available to a Judgment creditor in aid of the enforcement and execution upon a civil judgment are the provisions of Chap. 10, Sec. 41. The design of Sec. 41 is to allow a party seeking to enforce a judgment to use the available rules of discovery to uncover information concerning assets of the debtor, and to aid in execution of the judgment. See, also, Rule 69, M.R.Civ.P.; Rule 69, F.R.Civ.P.; *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1403 (5th Cir. 1993). *cert. denied,* 510 US. 1073 (1994)(post-judgment discovery may follow federal pretrial discovery or applicable state discovery law).

Under the circumstances of this case, it is imperative that the plaintiffs be allowed to utilize available discovery procedures to determine, with precision, the assets of the defendant, Glacier Electric Co-op, which may be found within the exterior of the Blackfeet Indian Reservation, subject to the jurisdiction of this Court, and available to enforce the underlying Judgment.

Consequently, the plaintiffs respectfully request the Court to enter an appropriate order granting the following relief:

(1) Order allowing the plaintiffs to engage in, and directing the defendant to cooperate in the discovery process for the purpose of determining the assets located within the exterior boundaries of the Blackfeet Indian Reservation which may be executed upon for the purpose of satisfying the underlying monetary Judgment. The plaintiffs request leave of Court to engage in discovery, in the form of written interrogatories and depositions upon oral examination to designed to aid in the enforcement and execution of the underlying monetary Judgment; and

(2) Order setting a date certain at which time the defendant/ debtor, Glacier Electric Co-op, shall appear before the Court concerning the property and other assets of the defendant that are located upon the Blackfeet Indian Reservation and subject to execution for the purpose of satisfying the underlying Judgment. See Title 25, Chap. 14, MCA [Proceedings in Aid of Execution), incorporated into the Blackfeet Tribal Law and Order Code of 1967 (as amended) pursuant to Chap. 2, Sec. 2 of said Code.

DATED this 25 day of February, 2002.

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/s/ _____
Attorneys for Plaintiffs

* * *

[Certificate of Service Omitted from Printing of this Appendix]

APPENDIX S

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IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION, BROWNING, MONTANA

NO. 92CA-269

[Filed March 4, 2002]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,

Plaintiffs,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant.

OBJECTION TO PETITION FOR ORDER TO ENFORCE AND AID THE EXECUTION OF JUDGMENT

COMES NOW the Defendant, Glacier Electric Cooperative, Inc., and respectfully objects to the Plaintiffs' Petition For Order To Enforce And Aid The Execution of Judgment for the following reasons:

(1) The nine-year-old Tribal Court judgment which the Plaintiffs seek to enforce has already been found to be invalid and unenforceable by the Ninth Circuit Court of Appeals. See, Bird v. Glacier Electric Cooperative. Inc., 255 F.3d 1136 (9th Cir. 2001)(copy attached). In a unanimous decision issued July 10, 2001, the Court of Appeals found that the Plaintiffs' themselves had invalidated the judgment by making inflammatory remarks in their closing argument so prejudicial as to violate Glacier Electric's right to due process. As stated unequivocally by the Court of Appeals: "We hold that Glacier Construction's appeal to racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated due process owed the Co-op." Bird, 255 F. 3d at 1152. Therefore, the Court of Appeals concluded that "[t]he tribal court judgment may not be recognized and enforced because to do so would again violate the due process rights of the Co-op." Id.

(2) This Court has also recognized that due process, and the need to be fair to *all* litigants, is absolutely essential to any Tribal Court proceeding. See, e.g., Henderson v. Blackfeet Indian Housing Authority, Blackfeet Tribal Cause No. 98-CA-561 (Clarified Judgment and Order issued April 15, 1999)(recognizing the importance of the due process

guarantees found in ICRA); Brown v. Schlaht, Blackfeet Tribal Cause No. 95-CA-40 (Order issued October 9, 1995)("this Court is ... compelled to consider the fairness to all parties concerned under long-standing principles of justice embraced by the Blackfeet Code and Constitution. A Tribal Court cannot elevate considerations of convenience above the need to be fair to all litigants); Hunter Burns v. North Winds Diversified. Inc., Blackfeet Tribal Cause No. 94-CA-550 (Order issued July 18, 1995)(holding to the same effect as Brown). Given that fact, and particularly since the Ninth Circuit Court of Appeals has already determined that the judgment was the result of proceedings so fundamentally unfair that it "may not be recognized and enforced because to do so would again violate the due process rights of the Co-op", the logical *and just* conclusion to reach here is that Plaintiffs' Petition to enforce the judgment in Tribal Court ought to be denied.

(3) Even if the judgment was not tainted by a lack of due process, the Plaintiffs' Petition would still be improper because the Co-op's assets are not subject to execution under the Tribal Code. The Code exempts from execution "all property of the Tribe, or any government agency, including the State of Montana, City of Browning, and United States, *or any other public or municipal corporation of like character[.]*" Chapter 10, Section 39A(7) of the Blackfeet Tribal Law & Order Code (emphasis added). The Co-op was organized under the Rural Electric And Telephone Cooperative Act found in Title 35, Chapter 18 of the Montana Code, and as such is considered a quasi-public agency, the property of which the Tribal Code exempts from execution because of the adverse effect on the public good which would otherwise occur.

In a case like the present, any effort to seize the Co-op's assets could disrupt electrical service to thousands of individuals and businesses on the Blackfeet Indian Reservation, and adversely effect not only the economy, but the safety and welfare of the public as well.

(4) Further, since the Co-op is owned by its members, and the Blackfeet Tribe, the State of Montana, the City of Browning and the United States government are all members of the Co-op, executing on the Co-op's assets would be tantamount to executing on the property of the precise governmental entities listed in the Code upon which execution is not allowed.

(5) Additionally, there is no means by which the assets of the Co-op could be executed upon under the Code anyway, because the Co-op is not a member of the Blackfeet Tribe. Chapter 10, Section 34 of the Code provides that only the Chief of Tribal Police may take and hold the assets of a judgment debtor. But of course the jurisdiction of the Chief of Tribal Police is restricted in dealing with persons other than not members of the Blackfeet Tribe. Since the Co-op is not a tribal member, the Chief of Police would not be in a position to effectively enforce a writ of execution against the Co-op's property, if such a writ were to be issued.

CONCLUSION

For nine (9) years, the Plaintiffs made no effort whatsoever to enforce their Tribal Court judgment in Tribal Court. Instead, they attempted to persuade a federal court to recognize and enforce the judgment, on "comity" grounds. But the federal court has declared

the judgment invalid and unenforceable, because it was the result of arguments by Plaintiffs so inflammatory as to violate fundamental notions of due process. The Co-op respectfully submits that this Court should follow the federal court's lead, and declare the judgment unenforceable in Tribal Court as well. A proposed order to that effect is being submitted herewith.

DATED this 4th day of March, 2002.

DAVIS, HATLEY, HAFFEMAN &TIGHE, P.C.

By **PAUL W. HAFFEMAN**
Paul R. Haffeman
Attorneys for Defendant

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX T

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IN THE COURT OF APPEALS FOR THE BLACKFEET INDIAN RESERVATION

Blackfeet Tribal Court Cause No. 92-CA-269

[Filed August 8, 2007]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.,	)
Plaintiffs,	)
-vs-	)

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant.

MOTION FOR ORDER REQUIRING JUDGMENT DEBTOR TO SUBMIT TO EXAMINATION

COME NOW the Plaintiffs in this case and pursuant to Judgment which was affirmed on appeal by the Court of Appeals from the Blackfeet Indian Reservation, move this Court to renew its Order of August 26, 2003, requiring the judgment debtor to submit to an examination concerning their assets and insurance to satisfy the judgment entered in this matter on May 19, 1993.

Attached to this Motion are the following documents:

a) A copy of the Judgment entered May 19, 1993;

b) A copy of the Order for Examination of judgment debtor entered by this Court on August 26, 2003;

c) A copy of the Order of the Court of Appeals dated March 13, 2007;

d) A copy of the Order filed July 17, 2007 by the Court of Appeals of the Blackfeet Indian Reservation denying the Petition for Rehearing.

As is shown by the Order for Examination previously entered on August 26, 2003, this Court has

previously ordered Defendant Glacier Electric Cooperative to appear for examination with respect to availability of insurance and assets to satisfy the Judgment entered in this matter. The Order prompted Defendant to appeal and, after many years, the appeal has been denied and Defendant's Petition for Rehearing has also been denied. It is now time to move forward. In that regard, Plaintiffs request that the Court order Defendant to have its general manager appear with the following documents:

1. A copy of its most current financial statement showing the Co-op's assets, liabilities, reserves and net worth.

2. A copy of all correspondence and communications with its insurer pertaining to the availability of its insurance to satisfy the underlying Judgment.

3. A record of its most current billing statements to customers within the exterior boundaries of the Blackfeet Reservation.

4. All records depicting or evidencing:

   a) All real property and improvements owned by the Co-op located within the exterior boundaries of the Blackfeet Reservation;

   b) Records of all personal property, fixtures, equipment, power lines, power poles and all other assets and lease-hold interests located within the exterior boundaries of the Blackfeet Reservation.

A proposed Order is lodged herewith.

DATED this 8 day of August, 2007.

PATRICK F. FLAHERTY
AND
UGRIN, ALEXANDER, ZADICK
& HIGGINS, P.C.

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IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET INDIAN RESERVATION, BROWNING, MONTANA

NO. 92CA-269

[Filed March 3, 2008]

SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,

Plaintiffs,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant.

STATE OF MONTANA)
: ss
County of Glacier)

AFFIDAVIT OF JASEN BRONEC

JASEN BRONEC, being first duly sworn, upon his oath, deposes and says that:

(1) I am a citizen of the United States, a resident of Cut Bank, Glacier County, Montana, of legal age, and competent to be a witness. Further, I am the Manager of Glacier Electric Cooperative, Inc. If called upon to testify I could testify to the following, all of which are within my own personal knowledge.

(2) I have reviewed the list of financial records and related documents which the Plaintiffs have moved the Court to order me, in my role as Manager of Glacier Electric, to appear with and produce at a hearing to be held on the Blackfeet Indian Reservation. All of that information is currently located off the Blackfeet Indian Reservation, either at Glacier Electric's headquarters in Cut Bank or elsewhere.

(3) Further your affiant says not.

/s/Jasen Bronec
JASEN BRONEC

SUBSCRIBED AND SWORN to before me this 21st day of February, 2008.

/s/
Notary Public for the State of Montana
Residing at Cut Bank, Montana
My commission expires: April 2, 2008

(NOTARIAL SEAL)

APPENDIX V

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Cause No. 08-30-GF-SHE-RKS

[Filed June 2, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.	)
	)
Defendants	)

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Glacier Electric Cooperative seeks injunctive and declaratory relief from this Court preventing the enforcement of a Judgment entered by the Blackfeet Tribal Court on May 19, 1993 and affirmed by the Court of Appeals for the Blackfeet Indian Reservation on May 30, 1995. Since that time, Plaintiff Glacier Electric Cooperative has refused to post a bond as ordered by the Tribal Court and most recently is in contempt of the Tribal Court Order to have a representative appear at a debtors exam and testify concerning assets located within and on the Reservation.

* * *

The Judgment entered by the Tribal Court and affirmed by the Court of Appeals for the Blackfeet Indian Reservation is valid and fully enforceable within the territorial jurisdiction of the Blackfeet Indian Nation. While Glacier Electric Cooperative seeks to enjoin enforcement on the Reservation and declare the Judgment invalid, the Federal Courts have not declared the Judgment to be invalid and, as a sovereign nation, the Blackfeet Indian Nation possesses the authority to enforce its own judgments through the judicial branch of its government. The Federal Court does not have power or jurisdiction to prevent enforcement of the Judgment on the Reservation.

THE NINTH CIRCUIT DECISION

The Ninth Circuit Court of Appeals *did not* declare the Judgment to be "invalid". In its Opinion in *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001) the Court of Appeals did not declare the Judgment entered by the Tribal Court to be invalid. Rather, the Ninth Circuit Court of Appeals, out of deference to the sovereignty of the Black feet Indian Nation, was cautious in limiting its holding to provide that the Judgment was not entitled to comity and, accordingly, recognition and enforcement in *Federal Court*. In this regard, the Ninth Circuit Court of Appeals expressly stated as follows:

> "Had this case been tried in Federal Court, our ruling might permit consideration of the possibility of a remand for new trial. But because the case was tried in Tribal Court, we hold only that the Tribal Court Judgment is not entitled to comity and may not be recognized or enforced in Federal Court."

Bird, 255 F.3d at 1153, N. 21 (emphasis supplied).

Most importantly, the Ninth Circuit Court of Appeals intimated that further proceeding in Tribal Court would be appropriate when the Court stated:

* * *

APPENDIX W

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

Cause No. 08-30-GF-SHE-RKS

[Filed July 17, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.	)
	)
Defendants	)
	)

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants have moved for summary judgment on the basis that this Court lacks the power and authority to prevent enforcement of a Tribal Court Judgment from assets located on the Reservation. The issue before the Court is one of law. Its determination may be made based upon the undisputed facts that are material to the issue: may a Federal Court enjoin the enforcement of a Tribal Court judgment on the Reservation?

Defendants' seek to enforce a Tribal Court Judgment from assets located on the Reservation and accounts receivable of Glacier Electric Cooperative owed by members of the Tribe, business located on the Reservation and the Tribe itself. Reservation electric sales are a substantial portion of the assets and revenue of Glacier Electric Cooperative. Glacier Electric Cooperative also has insurance coverage available to it that would respond to the Tribal Court Judgment making enforcement via attachment of accounts and assets on the Reservation unnecessary.

One state does not have the power to prevent enforcement of a judgment in another state just as one foreign country does not have the power to prevent enforcement of a judgment in another foreign country. This doctrine has been recognized by the Federal Courts and consistently by the United States Supreme Court.

Glacier Electric Cooperative has misstated several important facts and procedural matters in its Response Memorandum. First and foremost, Glacier Electric Cooperative contends in its Response Brief to this Court that the "Jurisdictional issue before the Court discussed in section B above is different than the jurisdictional issue considered by Judge Hatfield in 1998, because at that time the Defendants' were making no effort to enforce their Judgment in Tribal Court. They waited until after they had been prevented from utilizing the power of the Federal Courts to propel to Glacier Electric Cooperative to pay the Judgment to being the process of enforcement in Tribal Court." The statement by Glacier Electric Cooperative is false. The undisputed records of the Tribal Court establish that:

- Judgment in Tribal Court was entered on May 19, 1993. Entry of Judgment on this date is beyond dispute.

- Glacier Electric Cooperative refused to post a supersedeas bond as required by the Order of the Tribal Court and the Blackfeet Tribal Law and Order

* * *

APPENDIX X

IN THE BLACKFEET COURT OF APPEALS FOR THE BLACKFEET INDIAN RESERVATION

CASE NO. 97-CA-474
99-AP-37

[Dated April 4, 2007]

IN THE MATTER OF:

Kevin Tall White Man, on behalf
Of Wilbur Mountain Chief, deceased
And his estate on and behalf of his children
Karletta, Nathan, Vanessa and Adrian
Mountain Chief, and Patsy Crossguns,

PLAINTIFFS

v.s.

Blackfeet Indian Housing Authority

DEFENDANTS

Blackfeet Indian Housing Authority,

Third Party Plaintiff

v.s.

Simpson Dura-Vent Company, Inc.)
)
Third Party Defendant)
)

ORDER

IT HAS COME to the attention of the Blackfeet Tribal Court of Appeals that Ordinance 7 was terminated on March 4, 1999 by Resolution 100-99. This case was filed September 1, 1999. At that time Tribal 0rdinance 7 was not in effect, but rather a Charter for Blackfeet Housing was adopted on March 4, 1999 and is in effect.

This fact has now been discovered by the Blackfeet Court of Appeals. In order To prevent manifest injustice the order issued by this Court on November 23, 2004 and filed in the Blackfeet Tribal Court on January 19, 2005, which cited Ordinance 7, is hereby vacated.

This cause is remanded to the Blackfeet Tribal Court for further proceedings; but caution is given to the Tribal Court to ascertain whether or not the correct procedure was followed by both parties.

The request for re-hearing in the Blackfeet Court of Appeals is hereby denied.

DATE: 3-13-07 /s/Jackie Parsons
Jackie Parsons, Chief Judge

/s/
Justice

/s/
Justice

* * *

[*Certificate of Service Omitted from Printing of this Appendix*]

APPENDIX Y

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IN THE BLACKFEET TRIBAL COURT FOR THE BLACKFEET TRIBAL INDIAN RESERVATION

NO. 95-CA-40

[Filed October 9, 1995]

JAMES W. BROWN and MARGUERITE E. BROWN,	)
Plaintiffs,	)
-vs-	)
DELL SCHLAHT and CHICAGO INSURANCE COMPANY,	)
Defendants.	)

ORDER

Motions having been filed with the Court and having come on for hearing on Wednesday, September 27, 1995, at 1:30 p.m., parties being represented by counsel, and the Court being fully apprised in the premises, the Court makes the following ruling.

BIFURCATION

This action involves both a negligence claim against defendant Dell Schlaht and an insurance "bad faith" claim against Chicago Insurance Company. Ms. Schlaht and Chicago Insurance Company have moved to bifurcate the two types of claims. The plaintiffs, James and Marguerite Brown, have opposed the defendants' motions. For the reasons discussed below, the Court concludes that bifurcation is appropriate.

The Court has considered the arguments of counsel for the Browns regarding the convenience to the Court and the Browns of a single combined proceeding. However, as recently noted in *Hunter Burns v. North Winds Diversified, Inc. and Hawkeye Security Insurance Company,* Blackfeet Tribal Cause No. 94-CA-550 (July 18, 1995), the Court is also compelled to consider the fairness to all parties concerned under long-standing principles of justice embraced by the Blackfeet Code and Constitution. A Tribal Court cannot elevate considerations of convenience above the need to be fair to all litigants. Upon considering these principles of fairness and justice, the Court held in *Hunter Burns* that bifurcation of insurance "bad faith" claims from underlying claims against insureds is required under Tribal law. That conclusion applies with equal strength here.

In addition, the Court notes that bifurcation will actually simplify and streamline the process of resolving each of the two claims, by eliminating a number of thorny legal issues which are raised when "bad faith" claims are combined with claims against insureds. In the present case, the nature of this combined proceeding has already resulted in a discovery dispute which would likely have not arisen if the two claims had not been combined.

NOW THEREFORE, in consideration of the equities involved and for the reasons set forth above, IT IS HEREBY ORDERED that the actions instituted by James and Marguerite Brown against Dell Schlaht and Chicago Insurance Company are bifurcated, and that further case activity on the "bad faith" action against Chicago Insurance Company is stayed until the underlying negligence claim against Dell Schlaht is fully and finally resolved. Since this ruling effectively renders moot Dell Schlaht's pending motion for a protective order, that motion is hereby DENIED on that basis.

DATED this 9th day of October, 1995.

/s/ Howard Doore
HONORABLE JUDGE HOWARD DOORE

cc: Cameron Ferguson/Kraig Kazda
William Evan Jones/Charles McNeil
Paul R. Haffeman/Maxon R. Davis

APPENDIX Z

http://have.mynewsadvantage.com/cms/news/story-187050.html

Home » Local Headlines

SHARE

Janet Napolitano will visit Havre

Tim Leeds - tleeds@hav
Published: Monday, August 23rd, 2010

Janet Napolitano will visit Havre

Janet Napolitano, secretary of the U.S. Department of Homeland Security, is scheduled to hold a town hall meeting in Havre Wednesday to discuss northern border issues.

Napolitano and U.S. Customs and Border Protection on Commissioner Alan Bersin will join Montana's U.S. Sens. Max Baucus and Jon Tester for a tour of facilities in Montana, including at the Port of Piegan north of Babb and Port of Sweetgrass north of Shelby, before coming to Havre to tour the new Border Patrol Station that opened here in 2009.

Aaron Murphy, spokesman for Tester, said the town hall meeting set to start at 3 p.m. Wednesday at the Havre Border Patrol station, will be open for any topic, "from security to commerce to (the Port of) Whitetail."

Tester, who sits on the Senate Committee on Homeland Security and Governmental Affairs, invited Napolitano to tour the border in Montana.

Napolitano also will meet with state and local officials and private stakeholders to talk about issues regarding securing the northern border during the tour of facilities. After touring Sweetgrass, she is scheduled to have a round-table discussion about Homeland Security's collaboration with state, local and tribal law enforcement agencies on border issues.

She is scheduled to first stop in Great Falls Tuesday to tour the westside levee district of that community before starting her tour of the northern border facilities Wednesday.

After the Montana tour, Napolitano will travel to Chicago for a meeting Thursday with the International Association of Fire Chiefs and a later meeting with Mayor Richard Daley and other officials.

Several border issues have been prominent in the Havre area over the last few years, including a push to upgrade the Port of Wild Horse north of Havre to a 24-hour commercial facility, with local leaders in the Havre area and Alberta saying that would increase economic activities and provide a direct link to oil and gas fields in Alberta.

The construction of the new patrol station, built to house the increased number of Border Patrol agents who have come to the area after the Sept. 11, 2001, terrorist attacks was a high-profile item. Part of that discussion was about rumors that the agency planned to move its Havre Sector offices, housed just south of town, to Great Falls.

During those discussions in 2007 agency officials said no plans were in the books to move the sector office, which oversees the operations along the 452 miles of U.S.-Canadian border in the sector.

Another high profile issue is east of Havre, at the Port of Whitetail near Scobey. An $8.5 million upgrade of facilities at that port, which sees an average of five vehicles a day, was put on hold after the Canadian government announced it would shut down the facilities on its side of the port next spring.

Work on an $8-million upgrade to the U.S. facilities at Wild Horse north of Havre is ongoing this summer.

* * *

Havre Daily News
PO Box 431
Havre, MT 59501
Phone: 406-265-6795, Fax: 406-265-6798

173 (2)

No. 10-408

In the Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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October 22, 2010

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COUNTER-STATEMENT OF QUESTION PRESENTED

The only question that may be properly presented to this Court is the issue framed in Petitioner's Complaint and argued before the District Court: Whether Petitioner Glacier Electric Cooperative is prohibited from challenging tribal court subject matter jurisdiction a second time after expressly abandoning the issue during its first appeal to the U.S. Court of Appeals for the Ninth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Glacier Construction, Inc., a Montana company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of Glacier Construction, Inc.

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Appendix C: Order Granting Motion for Summary Judgment, In the Blackfeet Tribal Court for the Blackfeet Indian Reservation, Browning, Montana (September 12, 1994) 7b

TABLE OF AUTHORITIES

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168 U.S. 250 (1987) 6

STATEMENT OF THE CASE

Respondents (the Estate of Scott Sherburne, Ron Bird and Herb Gilham, Individually and on behalf of Glacier Construction, Inc.) brought suit in Blackfeet Tribal Court in 1992 for claims which arose out of contractual dealings between petitioner and respondents for construction on the Blackfeet Reservation of electrical power transmission facilities. Petitioner, Glacier Electric Cooperative, is an electric cooperative located in Cut Bank, Montana. Approximately eighty percent (80%) of its members are individuals and businesses that reside on the Blackfeet Reservation. A majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and reside within the exterior boundaries of the Blackfeet Reservation.

At the conclusion of the trial between the parties, judgment was entered against petitioner on May 19, 1993. An Appeal was filed by Petitioner in the Blackfeet Tribal Appellate Court. The petitioner did not make any objections during closing argument, nor did it raise any due process or other error with respect to the closing argument in its appeal to the Blackfeet Tribal Court of Appeals.

After the Blackfeet Tribal Appellate Court affirmed the Judgment, the petitioner opposed granting the Tribal Court judgment comity and challenged subject matter jurisdiction before the United States District Court. Judge Paul G. Hatfield, in a Memorandum and Order dated January 20, 1998, Pet.App. 81a, held that the Blackfeet Tribal Court had subject matter jurisdiction under the analysis approved by the United States Supreme Court in ***Montana v. United States***,

450 U.S. 544 (1981). Judge Hatfield's Memorandum and Order also addressed the subsequent decision of the United States Supreme Court in ***Strate v. A-1 Contractors***, 520 U.S. 438 (1997). Pet.App. 84a-97a.

Petitioner appealed the district court's decision to the U.S. Court of Appeals for the Ninth Circuit, but expressly abandoned the issue of subject matter jurisdiction and only challenged Judge Hatfield's ruling on comity. *See* Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 ("the Co-op abandons its position" regarding tribal court jurisdiction); *see also* Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b ("our appeal in Bird does not involve any issues of tribal jurisdiction").

The decision by the Ninth Circuit Court of Appeals in ***Bird v. Glacier Electric Coop. Inc.***, 255 F.3d 1136 (9th Cir. 2001) did not declare the judgment entered by the Blackfeet Tribal Court to be invalid. The Ninth Circuit carefully and consciously limited its holding to the due process requirement of extending comity to a tribal court judgment and ruled that that the Blackfeet Tribal Judgment was not entitled to comity for enforcement outside the boundaries of the reservation. The Ninth Circuit expressly stated that it declined to ". . . address whether there may be further proceedings in the tribal court." ***Bird***, 255 F.3 at 1139, N.2.

In 2008, during continuing efforts by respondents to obtain a Debtor's examination in Tribal Court, the petitioner filed this action in the United States District Court to once again challenge subject matter jurisdiction. The complaint filed by petitioner in the United States District Court did not raise any "special

circumstances" nor "due process" grounds. Its sole argument was that the tribal court lacked subject matter jurisdiction. Pet.App. 138a. The Complaint filed by Petitioner in 2008 makes clear that it was again challenging subject matter jurisdiction and it is devoid of any argument of due process or special circumstances that would warrant a reconsideration of subject matter jurisdiction. As stated in its Complaint:

> 28. The Defendants' Tribal Court Judgment is void because the Tribal Court did not have subject matter jurisdiction over the Glacier Construction business dispute.

App. 138a.

During oral argument, counsel on behalf of respondent confirmed to the United States District Court that respondents were not and would not seek to enforce the judgment from assets outside the Blackfeet Reservation. Pet.App. 27a and 39a. The district court held that the issue of tribal subject matter jurisdiction was "res judicata" based on petitioner's abandonment of the issue in its first appeal. Pet.App. 34a-38a. In an unpublished memorandum decision, the Ninth Circuit affirmed, holding that "issue preclusion attached to the district court's 1998 decision. . . . the determination of subject madder jurisdiction made by the district court was never disturbed." Pet.App. 2a-3a.

REASONS FOR DENYING PETITION

1. The petition presents no issue worthy of this Court's attention. The issue decided by the lower courts is one of ordinary civil procedure – the inability of a party to re-litigate an issue expressly abandoned

on appeal 10 years earlier in a proceeding between the same parties. The decisions by the lower courts were based upon basic fundamental concepts of civil procedure: law of the case, *res judicata* and issue preclusion. The petitioner is simply asking this Court to correct a perceived error by the lower courts which would entitle the petitioner to re-litigate tribal court subject matter jurisdiction many years after expressly abandoning the issue below. Res.App. 1b and 5b. The recent decision by the district court which granted respondents' Motion for Summary Judgment and was affirmed by the Ninth Circuit was grounded on well-established precedent of this Court and of the Ninth Circuit. ***Cocke v. Halsey***, 41 U.S. 71 (1842); ***Sherrer v. Sherrer***, 344 U.S. 343, 68 S.Ct. 108 (1948) and ***Donnovan v. Mazzola***, 761 F.2d 141 (9th Cir. 1985) *citing*, ***Sherrer v. Sherrer***, *supra*. Pet.App. 81a-98a.

The petitioner concedes that there is no conflict among the circuits that requires this Court's intervention. Petitioner only argues that the Ninth Circuit decision on issue preclusion contradicts decisions of this Court and Ninth Circuit precedent. *See* Petition at 13-15. The petitioner attempts to manufacture a change of facts that governed the decision on subject matter jurisdiction by United States District Judge Paul G. Hatfield in his Memorandum and Order of January 20, 1998. The underlying facts did not and could not change with respect to the determination that the tribal court had subject matter jurisdiction. Petitioner's large and pervasive presence on the Reservation and its contractual dealings with respondents and other members of the Tribe have not changed between the time of the initiation of the underlying action in tribal court in 1992 and today. The only pertinent fact which

petitioner seeks to avoid is that it had the opportunity to challenge subject matter jurisdiction, it did so at the District Court level in 1998 and then expressly abandoned the issue on its first appeal to the Ninth Circuit. *See* Brief of Appellant, Excerpt, In the United States Court of Appeals for the Ninth Circuit, Res.App. 1-3b, note 6 ("the Co-op abandons its position" regarding tribal court jurisdiction); *see also* Letter from Tiffany B. Lonnevik to Kathleen Butterfield, Resp.App. 5-6b ("our appeal in Bird does not involve any issues of tribal jurisdiction").

2. Contrary to petitioner's assertions, there has been no change in the law governing tribal court subject matter jurisdiction. The subject matter jurisdiction analysis undertaken by Judge Hatfield was based upon the decisions that are still controlling today: ***Montana v. United States***, ***supra*** and ***Strate v. A-1 Contractors, supra***. While petitioner argues that the decision in ***Plains Commerce Bank v. Long Family Land and Cattle Company***, 128 S.Ct. 2709 (2008) represented a change in the law, its reliance upon the decision is misplaced. Nothing in *Plains Commerce Bank* supports the proposition offered by the petitioner – that federal courts should ignore the doctines of *res judicata* and issue preclusion to allow a non-Indian party an opportunity to re-litigate subject matter jurisdiction in their effort to prevent the enforcement of a tribal court judgment within the tribe's reservation. Cleary, the petitioner is asking this Court to bend and twist its precedent in order to undo petitioner's abandonment of its challenge to tribal court subject matter jurisdiction 10 years ago.

As the Ninth Circuit noted in its decision, Pet.App. 1a, subject matter jurisdiction is a threshold inquiry.

Whether labeled "*res judicata*" or "issue preclusion", the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision by Judge Hatfield on subject matter jurisdiction. Subject matter jurisdiction was litigated by the same parties under the same facts in 1998. The petitioner attempts to now change the issue from subject matter jurisdiction as argued below, to due process in its petition to this Court. However, due process issues challenged in a foreign court with respect to enforcement of a foreign judgment on foreign ground are not a valid basis of collateral attack in the federal courts. A court in a sovereign state cannot interfere with the proceedings in a court of another sovereign state. ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964). The lower courts expressly followed the decision in ***Banco Nactional DeCuba***, *supra,* holding that an action by a foreign court may not be examined by a federal court even if the foreign action is in conflict "with our notions of justice – if those acts are executed within the foreign states' territory." ***Tchacosh Co. Ltd. v. Rockwell Int. Corp.***, 766 F.2d 1333, 1335-36 (9th Cir. 1995) *citing*, ***Banco Nactional DeCuba v. Sabbitino***, 376 U.S. 398, 428 (1964) and ***Underhill v. Hernandez***, 168 U.S. 250, 252 (1987).

3. Finally, petitioner asks this Court to consider "special circumstances" in an effort to circumnavigate the doctrines of *res judicata* and issue preclusion. However, petitioner failed to raise or ask the district court to consider any "special circumstances" in its Complaint, its Response Opposing Respondents' Motion for Summary Judgment, its Statement of Genuine Issues, its Memorandum in Support of Motion for Summary Judgment, or in its Reply Memorandum. It did not argue "special circumstances" at the hearing

before the district court on summary judgment. Although the claim for "special circumstances" is not properly before this Court, respondents do take issue with petitioner's characterization of certain facts.

First, petitioner advances another new argument of "special circumstance" not raised before the district court— a perceived threat to national security by cutting off of electricity to two border crossing stations on the Canadian border. Factually, the argument lacks any support as evidenced in the transcript of oral argument before the district court and by the recent proceedings in tribal court. Pet.App. 27a and 39a. Respondents simply seek to collect the judgment through payment of power bills for electricity sold to customers of petitioner within the reservation who are tribal members and tribal businesses. Respondents do not seek to cut off power to anyone inside or outside the reservation, nor is there is any threat of cutting wires or burning power poles. Petitioner's "special circumstance" of national security is a recent fabrication without any factual basis.

Second, petitioner argues that enforcement of the judgment would bankrupt or ruin the electric cooperative and qualifies as a "special circumstance." Petitioner fails to mention that a declaratory judgment action was filed in tribal court by respondents against Federated Insurance Company, petitioner's insurer. The declaratory judgment action sought and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner. Resp.App. 7b.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 99-35162

[Filed October 19, 1999]

RON BIRD, individually and on behalf of Glacier Construction, Inc.; HERB GILHAM, individually and on behalf of Glacier Construction, Inc; and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc.;

Plaintiffs/Counterdefendants/Appellees,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant/Counterclaimant/Appellant.

On Appeal from the United States District Court for the District of Montana, Great Falls Division, District Court Cause No. CV-96-022-GF-PGH

BRIEF OF APPELLANT

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* * *

[p.15]

the tribal judgment must not be recognized and enforced.[6] Guided by Hilton v. Guyot, 159 U.S. 113, 202-03 (1895), this Court articulated the factors due process encompasses in the context of comity. Those factors are: (1) the opportunity for a full and fair trial (2) before an impartial tribunal (3) that conducts the trial upon regular proceedings (4) after proper service or voluntary appearance of the defendant (5) without a showing of prejudice in the tribal court or in the system of governing laws. Id. at 811. Moreover,

> evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."

Id. (quoting Restatement (Third) of Foreign Relations Law of the United States [hereafter Restatement (3d)] § 482 cmt. b (1986)).

---

[6] In district court, the Co-op argued that lack of jurisdiction also applied so as to require non-recognition of the tribal court judgment. [See CR 53]. However, except to the extent that jurisdictional issues are part of comity's due process analysis, see *infra* n. 7, the Co-op abandons its position on that issue.

The tribal court proceedings at issue here fell far short of the requirements of due process. The tribal court record reflects every one of the constitutional deficiencies this Court warned against in Wilson. Furthermore, there is abundant evidence that the Blackfeet court system suffers from infirmities that directly

* * *

APPENDIX B

LAW OFFICE OF
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THE MILWAUKEE STATION, THIRD FLOOR
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[Letterhead Names/Numbers Omitted]

June 22, 2000

Kathleen Butterfield
Case Management Attorney/Deputy Clerk
U.S. Court of Appeals, 9th Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Bird et al. v. Glacier Electric Cooperative, Inc.*
Ninth Circuit Court of Appeals CA No. 99-35162

Dear Ms. Butterfield:

On May 18, 2000, we received the enclosed Order advising us, as counsel in Bird. *et al.* v. Glacier Electric, to confer with counsel in two other appeals to be orally argued on July 18, 2000 "because they may involve similar issues regarding Tribal Court jurisdiction." The two "related" appeals are:

1. Bugenig v. Hoopa Valley Tribe, CA No. 99-1-5654; and

2. Weter v. Archambault, CA No. 99-35638.

As instructed, we conferred with counsel in those two cases, and exchanged appellate briefs. It is now evident that these appeals are in fact dissimilar. Our appeal in Bird does not involve any issues of tribal jurisdiction, as do Bugenig and Weter. Enclosed please find a copy of the table of contents from our opening brief which shows there are no issues involving tribal jurisdiction. We thought the Court should be made aware of this fact before oral argument.

Very truly yours,

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

/s/ T. Lonnevik
By Tiffany B. Lonnevik

enclosures
cc: Jerry Lynch/Patrick Flaherty

APPENDIX C

IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN RESERVATION
BROWNING, MONTANA

CAUSE NO. 94CA32
[Filed September 12, 1994]

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SCOTT SHERBURNE, RON BIRD and HERB GILHAM, d/b/a GLACIER CONSTRUCTION, INC., and JULIE SHERBURNE, TONI GILHAM and PHYLLIS GILHAM,
Plaintiffs,

vs.)
)
THE FEDERATED RURAL ELECTRIC)
INSURANCE CORPORATION, AND)
GLACIER ELECTRIC COOPERATIVE,)
INC.,)
Defendants.)
)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter having been brought before the Court on motion of plaintiffs to grant summary judgment, and the Court, having read the briefs and other materials of the parties, and being fully advised,

IT IS HEREBY ORDERED that plaintiffs' Motion for Summary Judgment is granted; and

IT IS FURTHER ORDERED that insurance coverage is established, provided and available for payment of the Judgment in Case No. 92-CA-269, which Judgment was filed with The Blackfeet Tribal Court on May 19, 1993. The insurance coverage is provided by policies issued by The Federated Rural Electric Insurance Corporation as Follows: (1) Policy No. 25 ARB 005, described as an "all-risk blanket policy," up to the stated limits of $1,000,000; (2) Policy No. 25-DOM 012-92, described as a "Directors Managers Officers Liability and Corporate Indemnification Policy" up to the stated limits of $10,000,000; and (3) Policy No. 25 UMB 005, described as a

"Commercial Umbrella Policy," up to the stated limits of $10,000,000; and

IT IS FURTHER ORDERED that costs are awarded to the plaintiffs in accordance with Tribal law and in an exact amount to be determined at a later date

Dated this 12th day of September, 1994

/s/ Don Sollars
Tribal Court Judge

174 (3) OCT 28 2010

No. 10-408

In the Supreme Court of the United States

GLACIER ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

THE ESTATE OF SCOTT SHERBURNE, RON BIRD AND HERB GILHAM, Individually and on behalf of Glacier Construction, Inc.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At issue is a *sua sponte* ruling that issue preclusion bars consideration of injunctive relief where a tribal court has ordered enforcement of a money judgment against non-Indian assets, even where the trial lacked due process. *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136 (9th Cir. 2001).

In *Bird,* a comity proceeding, GEC did not appeal tribal court subject matter jurisdiction under the two exceptions in *Montana v. United States,* 450 U.S. 544, 564-66 (1981), concentrating instead on the lack of due process. A consideration of the tribal court's jurisdiction to enforce the judgment *on its own* was not necessary to the decision not to extend comity. That is self-evident from the decision: "we do [not] address whether there may be further proceedings in the tribal court." *Id.* at 1139 n.2. The Ninth Circuit held that the lack of due process *alone* prevented federal recognition and enforcement of the tribal judgment. *Id.* at 1152. Now, GEC's failure to appeal the issue of tribal subject matter jurisdiction in that proceeding has been given preclusive effect in GEC's action for injunctive and declaratory relief from tribal court orders allowing enforcement of the money judgment, notwithstanding the lack of due process.

Due process is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Facist Refugee Comm. v. McGrath,* 341 U.S. 123, 174 (1951). "[W]here no judicial resources have been spent on resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of [due process] so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000). The *sua sponte* ruling in district court gave GEC no chance to brief this issue or respond meaningfully at the summary judgment hearing, where in any event, the district court did not apply the correct preclusion doctrine. In the Ninth Circuit and other circuits, issue preclusion is a matter of law reviewed de novo; careful analysis is necessary to determine whether it has been properly applied. *See, e.g., McQuillon v. Schwarzennegger,* 369 F.3d 1091, 1096 (9th Cir. 2004); *United States v. Weiss,* 467 F.3d 1300, 1308 (11th Cir. 2006).

This *sua sponte* decision, and the Ninth Circuit's affirmance, has precluded consideration of the relief GEC sought in federal court: to enjoin Respondents from continuing their tribal court enforcement efforts against non-Indian assets within the exterior boundaries of the Blackfeet reservation. Pet. 6-7; Pet. App. 16a. In its Question Presented and Opposition, Respondents would have this Court believe the only issue is whether GEC may challenge for a second time the tribal court's subject matter jurisdiction: "[w]hether labeled '*res judicata*' or 'issue preclusion', the petitioner is not entitled to revisit subject matter jurisdiction or collaterally attack the decision . . .on subject matter jurisdiction." Opp. 6. The Opposition does not meaningfully refute any of GEC's cogent arguments why issue preclusion is not appropriate.

So far as GEC is aware, where a federal court has declined to recognize and enforce a tribal judgment for lack of due process, no federal court has decided that the losing party is nonetheless entitled to pursue enforcement against non-Indian assets *in the tribal court*, the very court whose proceedings lacked due process. Whether such an issue is barred by issue preclusion is squarely before this Court.

GEC contends that the tribal court's subject matter jurisdiction to order enforcement of the defective judgment has not only not been decided, but is nonwaivable and may be brought at any time. "Because tribal court jurisdiction is an issue of subject matter jurisdiction, it may not be waived, and Town Pump may raise the issue at any time during the suit." *Town Pump v. LaPlante,* 2010 WL 3469578, *1 (9th Cir. Sept. 3, 2010); *accord, Nevada v. Hicks,* 533 U.S. 353, 373 (2001)(challenges to tribal court jurisdiction "would presumably be nonwaivable"); *Stock West, Inc. v. Confederated Tribes of the Colville Reservation,* 873 F.2d 1221, 1228 (9th Cir. 1989)("a party cannot waive by consent or contract a [tribal] court's lack of subject matter jurisdiction"). While Respondents argue GEC "abandoned" the jurisdictional issue, Opp. 2, waiver is defined as "[t]he voluntary relinquishment or *abandonment* . . . of a legal right[.]" *BLACK'S LAW DICTIONARY* 1574 (7th Deluxe ed. 1999)(emphasis added). Thus GEC's right to question the tribal court's subject matter jurisdiction to order enforcement is not waived by allegations of "abandonment." Again, no determination of this issue was necessary – or made – in *Bird;* the only issue was whether *the federal court* should recognize and enforce the judgment. The subject matter jurisdiction of the tribal court to order

enforcement of its defective judgment has never been litigated to a final decision. It cannot be precluded.

In the Indian Civil Rights Act of 1968 (ICRA), Congress directs: "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). Section 1302(8) incorporates this language from the Fifth Amendment. Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective,* 76 N. DAK. L. REV. 311, 363 n.18 (2000). The Blackfeet tribal courts adopted Anglo-Saxon law and procedures. *Bird,* 255 F.3d at 1143-44 & n.13; SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 17 (1978). Consequently, there is no concept or notion of Blackfeet due process that differs from this Court's concept of due process. Blackfeet decisions extol due process for litigants in their courts. *See, e.g., Brown v. Schlact,* No. 95-CA-40 ("the Court is . . . compelled to consider the fairness to all parties . . . under long-standing principles of justice embraced by the Blackfeet Code and Constitution"). Pet. App. 248a. "[T]he avowed aspiration of the [Blackfeet] chief judge is that the court be 'just like the regular [white] courts.'" BRAKEL, *AMERICAN INDIAN TRIBAL COURTS–THE COSTS OF SEPARATE JUSTICE* 70. There is no reason to defer to any Blackfeet due process notion, because there is none. The closing argument here was in contravention of all parties' notions of due process.

Because there is no separation of Blackfeet/Anglo-Saxon due process, and given Congress's mandate that non-Indians must be afforded due process in tribal courts, this Court's decision in *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 69-72 (1978) – that the sole remedy for a due process violation in tribal court is habeas review of the legality of detention – might be revisited. GEC was precluded from making such an argument because of the *sua sponte* ruling and the Ninth Circuit's affirmance. Pet. App. 1a-3a.

Given the Congressional mandate of due process and the acknowledged Blackfeet adoption of Anglo-Saxon law, a federal court may declare GEC's due process rights in tribal court and consider whether Respondents should be enjoined from enforcing the judgment against the assets of a non-Indian corporation on non-Indian fee land and/or Congressionally granted utility rights-of-way, *including collecting payments due* for electricity that is administrated, generated, and transmitted on non-Indian land. This is a question of federal law, just as are federal determinations of tribal jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 857 (1985)("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction"). This Court recognizes "Congress's desire to extend the [IRCA's] guarantees to non-Indians if and where they come under a tribe's . . . *civil jurisdiction.*" *Oliphant v. The Suquamish Indian Tribe,* 435 U.S. 191, 196 n.6 (1978)(emphasis added). If that is true, and Blackfeet due process is identical to this Court's due process, why should habeas relief be the only remedy for a violation of 25 U.S.C. § 1302(8)?

This Court should settle this law by granting the Petition to enable consideration of the real issues this case presents, either by considering them in this Court

as a matter of law, or by remanding for a lower federal court to decide in the first instance.

II.

REVIEW OF THE NINTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL LAW THAT THE CIRCUIT HAS DECIDED IN CONFLICT WITH OTHER CIRCUITS AND RELEVANT DECISIONS OF THIS COURT

This Court holds that issue preclusion must be analyzed in light of past and current facts, as well as recent precedent and Constitutional concerns, to determine if it is applicable and – even if it is – whether there are special circumstances *not* to apply it. *See* Pet. 10-29. The district court and Ninth Circuit did not do so. Instead, both courts treated preclusion as self-evident because GEC did not appeal the tribal jurisdiction, when an appeal based on due process clearly was sufficient for purposes of comity. *Ipso facto*, these courts concluded the tribal court may enforce its judgment because all other issues are precluded. When federal appellate courts issue dispositions on issue preclusion, usually the analysis is thorough. *See, e.g., Irvin v. United States,* 335 Fed. Appx. 821 (11th Cir. 2009).

In contrast, this Court holds that jurisdiction is a *separate* question from what relief, if any, is available. *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557, 561 (1968). This precedent should be especially true where the Congressionally-mandated due process was lacking,

and where the district court's *sua sponte* order gave GEC no chance to be heard on the question of issue preclusion, further violating GEC's due process rights. *California Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 180-81 (9th Cir. 1974).

In the usual case, even if there is jurisdiction, a judgment rendered without due process may not be enforced; it is void. *Espinoza v. United Student Aid Funds,* 553 F.3d 1193, 1202 (9th Cir. 2008). Jurisdiction and due process are the *sine qua non* of federal court recognition and enforcement of tribal judgments in comity proceedings. *Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). If this Court holds that a tribal judgment may be declared null and void for lack of jurisdiction, *Plains,* 128 S. Ct. at 2717, this Court should also be able to decide whether a tribal judgment may be declared null and void for lack of due process, especially where no deference is indicated. Short of requesting a declaration that such a judgment is null and void, GEC should still have the *opportunity* to argue that a federal court may enjoin Respondents from pursuing their enforcement efforts in tribal court. *Cf. Burrell v. Armijo,* 456 F.3d 1159, 1166, 1170-73 (10th Cir. 2006)(Tenth Circuit concludes, unlike the Ninth Circuit here, that issue preclusion does not bar consideration of the merits where there is a fundamental lack of due process).

What is more, even if GEC had appealed tribal subject matter jurisdiction to try the case under the *Montana* exceptions in *Bird* and lost, that would have no effect on the determination that the tribal court trial lacked due process. The same questions posed here would remain. And, since Respondents are

seeking non-Indian assets on non-Indian land and Congressionally-mandated rights-of-way within the exterior boundaries of the reservation, and seeking to seize payments due for electricity transmitted on those rights-of-way, there is a conflict with this Court's decision in *Plains*. *Plains* holds that the *Montana* exceptions do not grant tribes automatic regulatory or adjudicatory authority over a non-member, and especially not on non-tribal land where, even now, this tribal enforcement is taking place. 128 S. Ct. at 2722.

III.

MISSTATEMENTS OF FACT AND LAW

Respondents claim no argument was made post-judgment to the Blackfeet appeals court regarding lack of due process *in closing argument*. Opp. 1. This implies there was no fair opportunity for the appellate court to consider GEC's due process concerns. But, Paragraph 25 of the Notice of Appeal to the Blackfeet Appellate Court states: "*The entire proceedings* were conducted in such a fashion as to violate the Co-op's rights to procedural and substantive due process." Reply App. 7a. This encompasses the closing argument. And, the Notice of Appeal states that the damages appear "to have been given under the influence of passion or prejudice," Reply App. 6a, para. 18, and challenges the "all-Indian jury in violation of the Co-op's rights to due process and equal protection of the law." Reply App. 4a, para. 11. GEC's Opening Brief in that appeal discusses not only the all-Indian jury, but the due process requirements of section 1302(8) as well. Reply App. 10a-12a. The Brief points out that Respondents' attorney elicited improper opinions "that GEC and its manager Bill Chapman are

racists," Reply App. 12a, which came through loud and clear in the closing argument quoted at length in *Bird*, 255 F.3d at 1149-50. Five pages of the Opening Brief (Reply App. 14a-18a) are devoted to the damages awarded and the fact they could only have resulted from passion and prejudice, concluding:

> [T]here can be little doubt that the highly inflammatory manner in which the plaintiffs' attorney tried the case was designed to achieve exactly this result. The plaintiffs were aided in no small part in achieving this result by the trial court's failure to sustain GEC's repeated objections to the immaterial, incompetent, speculative and highly prejudicial evidence plaintiffs relied upon to prove that RACISM was the motivation behind all of GEC's actions.

Reply App. 16a-17a. Finally, the Conclusion to the Opening Brief leaves no doubt that the Blackfeet appellate court had notice of GEC's due process argument concerning the entire trial, including closing argument:

> From start to finish, the trial court proceedings in this case were handled in such a manner as to deprive GEC of the fundamental right to a fair trial. . . . Judge Sellars consistently failed to apply the law in an evenhanded fashion, so that the result would be one which both sides in this action would consider to be fair and just.

Reply App. 18a-19a.

Respondents argue GEC raised no "special circumstances" arguments before the district court.

Opp. 2-3. But, *Respondents* made no arguments there regarding issue preclusion, and this ball was in their court. That is why the district court made its *sua sponte* "res judicata" ruling, albeit with the wrong preclusion doctrine. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984)(explaining the difference between preclusion doctrines). This Court has applied the "special circumstances" exception specifically to issue preclusion. *Montana v. United States*, 440 U.S. 147, 162-63 (1979). Thus, because Respondents did not argue issue preclusion at all, there was no occasion for GEC to bring up the special circumstances exceptions – including border security – until it challenged the district court's *sua sponte* ruling on appeal. What is more, the affidavit of GEC's manager quoted in GEC's Petition at 27-28 explaining this danger was attached to GEC's Complaint for Injunctive and Declaratory Relief. Pet. App. 151a-152a. Respondents' statement that this was "not raised before the district court" is false. Opp. 7.

Respondents claim the Complaint for Injunctive and Declaratory Relief did not raise any due process grounds. Opp. 2-3. This assertion is also false. Not only did GEC argue the lack of due process given the decision in *Bird*, Pet. App. 144a-145a, paras. 15 & 16, but it also requested relief on those due process grounds. Pet. App. 150a, para. 2. This correction also applies to Respondents' argument that Paragraph 28 of the Complaint makes it clear that only subject matter jurisdiction is challenged. Opp. 3.

Finally, Respondents claim that they sought "and obtained a declaration that the policy of insurance would apply to the judgment entered against petitioner." Opp. 7. However, that action for a

declaratory judgment was filed in tribal court. GEC and the insurer, Federated Rural Electric Insurance Cooperative ("Federated"), moved to dismiss for lack of jurisdiction, among other things. That motion to dismiss was never decided. Instead, the tribal court granted summary judgment in favor of coverage. In 1994, Federated timely filed a notice of appeal, but the appeal has never been acted upon. All of this information was before the district court in GEC's Brief in Support of Plaintiff's Motion for Summary Judgment, filed August 4, 2008, including citations to the relevant records in the tribal court. Reply App. 21a-22a. Thus, the matter of insurance coverage – while completely irrelevant to the issues here – is not as simple as Respondents would have this Court believe.

CONCLUSION

"A federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *National Farmers Union*, 471 U.S. at 853. This determination is abrogated when it is erroneously assumed that issue preclusion bars review of: (1) whether a tribal court has jurisdiction to enforce a judgment despite the lack of due process; (2) whether that court has jurisdiction to order seizure of non-Indian assets on non-Indian land and payments due from the administration, transmission, production, and provision of electricity over non-Indian land; and (3) whether, in the exercise of that jurisdiction, the tribal court threatens the security of the U.S./Canada border by ordering seizure of payments for electrical service where Respondents admit that "[a] majority of the individual customers of Glacier Electric Cooperative are members of the Blackfeet Tribe and

reside within the exterior boundaries of the Blackfeet Reservation" and that "[a]pproximately eighty percent (80%) of [GEC's] members are individuals and businesses that reside on the Blackfeet Reservation." Opp. 1. It is surely obvious that seizure of payments will severely hamper GEC's ability to provide electricity to the border stations, if not prevent it outright.

This Court should grant the Petition so that it may be determined whether Blackfeet tribal enforcement of a judgment rendered without due process is an unlawful exercise of tribal court judicial power. GEC has a right to be protected against such an unlawful exercise of tribal authority.

Respectfully submitted,

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APPENDIX 1

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**IN THE BLACKFEET TRIBAL COURT
FOR THE BLACKFEET INDIAN
RESERVATION
BROWNING, MONTANA**

NO. 92-CA-259

[Filed June 2, 1993]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of Glacier Construction, Inc., Plaintiffs,	)
-vs-	)
GLACIER ELECTRIC COOPERATIVE, INC., Defendant.	)

NOTICE OF APPEAL

Notice is hereby given that Glacier Electric Cooperative, Inc. ("the Co-op"), defendant above-named, hereby appeals to the Blackfeet Tribal Court of Appeals from the final judgment entered in this action on the 19th day of May, 1993. Grounds for this appeal are that:

1) The trial Court erred in denying the Co-op's motion for the substitution of a non-Blackfeet Tribal judge to hear this matter, because all Blackfeet Tribal judges are consumer-members of the Co-op, and thus it was inappropriate to have such persons adjudicate a matter which has the potential of having a direct financial impact on a cooperative of which such judges are consumers and/or members;

2) The trial Court erred in denying the Co-op's motion to dismiss based on insufficiency of service of process, because the Summons and Complaint were simply mailed to the Co-op instead of being served in the manner prescribed by the Blackfeet Tribal Law & Order Code;

3) The Trial Court erred in denying the Co-op's motion to dismiss based on lack of personal jurisdiction over the Co-op, because the Tribal Court lacks jurisdiction over a Montana Rural Electric Cooperative which is not a member of the Tribe and has its principal place of business off of the reservation;

4) The trial Court erred in denying the Co-op's motion to dismiss based on lack of subject matter jurisdiction, because the Tribal Court lacks jurisdiction

over a contract-based controversy involving a dispute between a Montana cooperative and a Montana corporation, when neither of which are members of the Tribe;

5) The trial Court erred in denying the Co-op's motion to dismiss based on the individual plaintiffs' failure to state any claim for said individuals upon which relief can be granted, because the individual plaintiffs have no standing to sue by virtue of their ownership interests in Glacier Construction, Inc.;

6) The trial Court erred in denying the Co-op's motion to dismiss based on the corporate plaintiff's failure to state any claim for said corporation upon which relief can be granted, because:

a) There is no private right of action arising under the Blackfeet TERO, particularly where the plaintiffs have failed to exhaust their administrative remedies;

b) The factual allegations of the complaint fail to make out a sufficient case for breach of contract;

c) The factual allegations of the complaint fail to make out a sufficient case for negligent misrepresentation;

d) The factual allegations of the complaint fail to make out a sufficient case for constructive fraud; and

e) The factual allegations of the complaint fail to make out a sufficient case for defamation;

7) The trial Court erred in denying the Co-op's Motion for Reconsideration of the September 1, 1992, Order denying the Co-op's motions to dismiss, because the Court failed to take consider the Co-op's reply brief in support of those motions prior to issuing its decision, and because the motions to dismiss were all meritorious;

8) The trial Court erred in denying the Co-op's motion for summary judgment because there is a forum selection clause contained within the identified written contract between the Co-op and Glacier Construction, Inc., which clause mandates that any dispute between the Co-op and Glacier Construction will be heard in the Montana Ninth Judicial District Court, to the exclusion of any other forum, including this Tribal Court;

9) The trial Court erred in allowing plaintiffs to litigate their claims against the Co-op without first exhausting the administrative remedies mandated by TERO;

10) The trial Court erred in allowing plaintiffs to litigate an independent right of action for an alleged violation of Article VII, Section 2 of the Blackfeet Constitution, by improperly determining that an independent right of action exists for claimed Constitution violations;

11) The trial Court erred in overruling the Co-op's objection to the all-Indian jury in violation of the Co-op's rights to due process and equal protection of the law;

12) The trial Court made numerous errors on evidentiary rulings at trial, including but not limited to, its decisions to:

a. overrule the Co-op's objection to plaintiffs eliciting personal opinions from witnesses David Azure, Don white, Scott Sherburne, Jack Kelly, Ron Bird, Herb Gilham, Bill Aubrey, Merle "Jeep" McGee and Bob Gervais;

b. overrule the Co-op's objection to plaintiffs eliciting legal conclusions from witness Don White;

c. overrule the Co-op's objection to rebuttal testimony by witness Bob Gervais; and

d. overrule the Co-op's objection to plaintiffs introducing Tribal laws and ordinances into evidence.

13) The trial Court erred in granting plaintiffs' request for a jury view and in so doing, allowed the jury to receive and consider unsworn testimony and other evidence which was irrelevant and unfairly prejudicial to the Co-op;

14) The trial Court erred in denying the Co-op's motion for a directed verdict dismissing one or more of the counts to plaintiffs' complaint;

15) The trial Court erred in giving the jury instructions which reflected the source of each such instruction and the identity of the party which proposed each such instruction;

16) The trial Court erred in giving the jury instructions Nos. 13, 14, 16, 17, 18, 19, 20, 21, 22, 23,

24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58, in that said instructions are not correct statements of the law and/or said instructions were not applicable to the case in light of the evidence presented at trial and the applicable law;

17) The trial Court erred in refusing the Co-op's proposed instruction Nos. 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 27, 28, 29, 30, 32, 33, 39, 40, 41, 43, 44, 49, 51, 54, 58, 60, 62, 64 and 67, in that said instructions were correct statements of the law, and the failure to give such instructions deprived the Co-op of the right to have the jury fully instructed on the applicable law;

18) The damages awarded by the jury are excessive and appear to have been given under the influence of passion or prejudice;

19) There was insufficient evidence presented at trial to justify the verdict;

20) The trial Court erred in denying the Co-op's Motion to Stay Entry of Judgment and entering judgment without first completing the punitive damages review procedures set forth in § 27-1-221, MCA;

21) The punitive damages awarded by the judge are excessive and appear to have been given under the influence of passion or prejudice;

22) There was insufficient evidence presented at trial to justify the judge's decision to enter judgment on the verdict, and such judgment is against the law;

23) The trial Court erred in assessing "costs of the jury" and "jury/court costs" against the Co-op in the sum of $11,125.00;

24) The Co-op's has been deprived of the right to full political participation in the Blackfeet Indian Reservation, and thus should not and cannot be compelled to be subject to the authority of the Blackfeet judicial system;

25) The entire proceedings were conducted in such a fashion as to violate the Co-op's rights to procedural and substantive due process; and

26) Any other grounds which may become apparent upon a review of the transcript.

DATED this 2nd day of June, 1993.

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[*Certification of Service of Mail Omitted in Printing of this Appendix*]

APPENDIX 2

NO. 92-CA-269
NO. 93-AP-18

IN THE COURT OF APPEALS
FOR THE BLACKFEET INDIAN RESERVATION

[Dated September 20, 1993]

RON BIRD, HERB GILHAM and SCOTT SHERBURNE, individually and on behalf of GLACIER CONSTRUCTION, INC.

Plaintiffs and Respondents,

-vs-

GLACIER ELECTRIC COOPERATIVE, INC.,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

APPEARANCES:

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* * *

action, with an instruction to the plaintiffs to refile their case in state district court in Cut Bank.

Moreover, since, as noted above, the dispute is between a Montana corporation and a Montana cooperative, it is altogether appropriate that the dispute be heard in a Montana state court. That court is, fundamentally, the most appropriate forum. Hence, the clause was altogether fit and proper. It should have been honored.

ISSUE NO.7: THE USE OF AN ALL-INDIAN JURY PANEL VIOLATED GEC'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

On the first day of trial, prior to jury selection, the Co-op objected that jury panel drawn for the case did not represent a cross-section of the community,

because it was made up entirely of enrolled members of the Blackfeet Tribe.[15] As such, the panel violated the Co-op's due process and equal protection rights as guaranteed by the United States Constitution and the Indian Civil Rights Act.[16] Judge Pete Sellars clearly erred in overruling the Co-op's objection.[17]

In 1968, Congress enacted Title I of the Indian Civil Rights Act, 25 U.S.C. § 1301 – 1303. Section 1302 of the Act states that:

> No Indian Tribe in exercising powers of self-government shall:
>
> * * *
>
> (8) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . .

Paragraph (8) of 25 U.S.C. § 1302 specifically prohibits a tribal Court from denying equal protection of its laws and due process to any party subject to its jurisdiction, whether Indian or non-Indian. Duro v. Reina, 851 F.2d 1136 (9th Cir. 1987).

The Indian Civil Rights Act is modeled after the Constitution of the United States, and is to be interpreted in light of U.S. Constitution law decisions. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th

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[15] A copy of the list of jury panel members is attached to this brief as Exhibit "D."

[16] Tr. p. 10, ln.9 through p. 11, ln. 6.

[17] Tr. p. 12, ln. 14-15.

Cir. 1976). Accordingly, equal protection and due process analysis used for jury selection in federal courts is applicable to the present case.

The rights of a party to equal protection and due process in jury selection under the Federal Constitution are derived from two principle sources. The due process guarantee is embodied in the Sixth and Fourteenth Amendments, which provide that a party is entitled to a jury drawn from a representative cross section of the community. Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979). The equal protection guarantee is embodied in the Fifth and Fourteenth Amendments, which prohibit the

* * *

F.R.Civ.P. None of these witnesses had a factual basis to be able to provide an opinion on what motivated Bill Chapman to act in the manner in which he did. Yet each was permitted – over objection – to do so.

Finally, and perhaps most importantly, the opinions elicited by Glacier Construction's attorney were inadmissible because they were unfairly prejudicial. Rule 403, F.R.Civ.P. provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Here, the opinions elicited by Glacier Construction's attorney that GEC and its manger Bill Chapman are racists were clearly unfairly prejudicial, and should have been excluded.

By refusing to exclude irrelevant, immaterial, incompetent, and unfairly prejudicial testimony by plaintiffs' witnesses, Judge Sellars deprived GEC of

the fundamental right to a fair trial, and the judgment should be reversed accordingly.[26]

* * *

Under the foregoing principles, the "economic rights" provision in Sec. 2 of Article VIII of the Blackfeet Tribe's constitution is not self-executing. As a first point, those "economic rights" are not defined. It makes no sense to expose anyone – be he Indian or non-Indian – to liability for violating someone else's rights, when that person has no idea how extensive the rights are or, for that matter, what sort of conduct will be viewed as violating those rights.

Indeed, the clearest proof that Sec. 2 of Article VIII is not self-executing is the fact that the Tribal Council itself saw need to enact TERO. Of course, when the Tribal Council did so, it chose (as was noted previously) not to provide just the sort of private enforcement mechanism which the plaintiffs here think that they can create out of thin air.

Judge Sellars erred in instructing the jury to rule on the question of whether GEC violated the plaintiffs' right to economic self-determination. The Blackfeet

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[26] Ironically, when the Co-op tried to rebut the opinions of plaintiffs' witnesses with testimony that the Co-op was not racist, Glacier Construction's attorney repeatedly objected on the grounds of speculation and foundation. (Tr. 1225-26). Although the trial court recognized that it had to allow GEC to ask its witnesses whether they felt the Co-op was racist since plaintiffs had done opened the door or this issue, such rebuttal obviously did little to overcome the unsubstantiated allegations of racism made by plaintiffs in their case-in-chief.

constitutional provision upon which that right is based is not a self-executing provision, and therefore that provision could not be the basis for an independent cause of action.

ISSUE NO. 16: THE DAMAGES AWARDED BY THE JURY ARE EXCESSIVE AND APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE

The jury in this case awarded the plaintiffs compensatory damages in the amount of $1,382,181.60 for lost profits, plus another $750,000.00 in punitive damages. These amounts were clearly excessive, and appear to have been given under the influence of passion or prejudice.

The only evidence introduced at trial on the issue of damages was Scott Sherburne's testimony that the present value of Glacier Construction's lost profits over a twenty year period into the future was $900,000.00. (Tr. 723). This highly speculative figure was based on the assumption that if the Co-op would have honored its legal obligations to Glacier Construction, Glacier Construction would have obtained the funding it needed to buy new equipment, hire the qualified lineman it was lacking, and transform itself into a highly profitable business. Thus, the compensatory damage award of nearly $1.4 million dollars in compensatory damages alone was approximately fifty percent higher than plaintiffs themselves believed they were entitled to.

Though the amount of compensatory damages is solely within the providence of the jury, the jury is not given carte blanche; rather, some substantial evidence

must exist upon which the award may be predicated. Sanders v. Mount Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972); Bottrell v. American Bank, supra, 773 P.2d at 707. Similarly, to sustain any award of punitive damages at all for the sake of example and by way of punishing the defendant, there must be clear and convincing evidence in the record that the defendant acted with actual fraud or actual malice toward the plaintiff. 27-1-221, MCA.

In Bottrell, supra, the plaintiffs suing a bank for negligent misrepresentation claimed that as a result of the bank's actions, they suffered $312,000.00 in compensatory damages. However, in its verdict the jury awarded compensatory damages totalling $500,000.00. The Montana Supreme Court held that since there was no evidence to support the verdict, the compensatory damage award could not stand. Id. at 708.

The same reasoning applies in the case at bar. The compensatory damage figure most favorable to the plaintiffs found in the evidence is $900,000.00, without even taking into the extent to which plaintiffs have mitigated their damages as a result of doing alternative work. A plaintiff has a duty to mitigate his damages, and such mitigation must be taken into account by the jury in calculating a compensatory damage award. See e.g., McPherson v. Kerr, 195 Mont. 454, 636 P.2d 852 (1981). In the present case, Scott Sherburne testified that he is now earning $36,000.00 per year working for the Blackfeet Housing Authority, which is far more than he made at Glacier Construction. (Tr. 733). Similarly, Ron Bird testified that he is now working as a transportation director for the Blackfeet Tribe (Tr. 929), while Herb Gilham

testified that he is now bartending. (Tr. 1112). Thus, for the jury award even the full $900,000.00 in lost profits claimed by the plaintiffs would be excessive, since plaintiffs clearly have been able to mitigate their damages to a significant degree.

Since there was no evidence introduced at trial to support the compensatory damage award anywhere approaching $1.4 million, that award cannot stand.

Similarly, there was a complete absence of "clear and convincing evidence" that GEC acted with actual fraud or actual malice in its dealings with Glacier Construction. Although plaintiffs speculated that GEC was plotting to put it Glacier Construction out of business because it did not want an Indian owned contracting firm to succeed, the evidence showed that GEC actually afforded Glacier construction special treatment such as allowing twice monthly billings by Glacier construction (Tr. 569, 580), and giving Glacier Construction more than one chance to submit prices on project. (Tr. 580, 741-43).

The fact that the jury awarded compensatory damages which far exceeded plaintiffs' actual provable damages, and the fact that the jury assessed punitive damages at all, indicates that such the verdict was influenced by passion or prejudice on the part of the jury. Indeed, there can be little doubt that the highly inflammatory manner in which the plaintiffs' attorney tried the case was designed to achieve exactly this result. The plaintiffs were aided in no small part in achieving this result by the trial court's failure to sustain GEC's repeated objections to the immaterial, incompetent, speculative and highly prejudicial

evidence plaintiffs relied upon to prove that RACISM was the motivation behind all of GEC's actions

ISSUE NO. 17: THE TRIAL COURT ERRED IN REFUSING TO FOLLOW THE PUNITIVE DAMAGE REVIEW PROCEDURES MANDATED BY § 27-1-221, MCA

The patently unfair assessment of punitive damages against GEC could have, and should have, been handled at the trial court level by Judge Sellars. However, Judge Sellars refused to follow the mandatory punitive damages review procedures found in the applicable law.

The Blackfeet Tribal Law & Order Code contains no procedural rules for assessing punitive damages in civil actions such as the present. The only reference to punitive damages which exists in the Code is found at Chapter 2, Sec. 3 of the Blackfeet Tribal Law & Order Code, which states simply that "Where the injury was deliberately inflicted, the judgment may include an additional penalty upon the defendant. . . ."[30]

In the absence of Tribal procedural rules for assessing punitive damages in this action, the Court chose to follow state law in instructing the jury on the issue punitive damages. The instructions given by the Court to the jury on the issue of punitive damages were based directly on the

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[30] Interestingly, pursuant to Ch. 2, Sec. 3, the punitive damages penalty assessed against the defendant do not automatically go to the plaintiff. Instead, they "may run either in favor of the injured party or in favor of the Blackfeet Tribe."

* * *

ISSUE NO. 18: THE TRIAL COURT ERRED IN ASSESSING "COSTS OF THE JURY" AND "JURY/COURT COSTS" AGAINST GEC EXCEEDING $11,000.

To add insult to injury, the judgment Judge Sellars signed contained an assessment of more than $11,000.00 against GEC for "costs of the jury" and "jury/court costs." This was in addition to the "costs" claimed by the plaintiffs and awarded by the court. GEC has no idea what "costs of the jury" and "jury/court costs" judge Sellars is referring to, since he never bothered to explain in the judgment where they came from, or how they were calculated. Clearly, it was error for Judge Sellars to attempt to make GEC responsible for "costs of the jury" and "jury/court costs" for such an enormous amount, without even giving GEC any notice what it was being expected to pay for.

V.

CONCLUSION

From start to finish, the trial court proceedings in this case were handled in such a manner as to deprive GEC of the fundamental right to a fair trial. Mere words cannot express the dismay GEC and its attorneys have experienced as a result of the errors of judgment made by Judge Sellars, on essentially every single substantive legal issue he was faced with. From the Motion to Substitute Judge to the Motion to the Motion to Stay Entry of Judgment pending review of the punitive damages, Judge Sellars consistently failed to apply the law in an evenhanded fashion, so that the

result would be one which both sides in this action would consider to be fair and just.

Luckily, there is a means available under Tribal law for seeking relief from the injustices that have occurred. Because trial courts will sometimes make errors, the Tribal Council has organized this Court of Appeals to review decisions of the trial courts and reverse those decisions when justice so requires. This case is one where justice does require reversal of the trial court's decisions, and the judgment based on those erroneous decisions, on the multitude of grounds set forth above.

DATED this 20th day of September, 1993.

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APPENDIX 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

CAUSE NO: CV-08-30-GF-SEH

[Dated August 4, 2008]

GLACIER ELECTRIC COOPERATIVE, INC.,	)
Plaintiff,	)
-vs-	)
THE ESTATE OF SCOTT SHERBURNE, RON BIRD and HERB GILHAM, Individually and on behalf of Glacier	)

Construction, Inc.,)
)
Defendants.)
_____)

BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case involves the question of whether the Blackfeet Tribal Court has jurisdiction over commercial litigation against Glacier Electric Cooperative, Inc. (the Co-op) which led to a multi-million dollar judgment that the Ninth Circuit Court of Appeals has found to be unenforceable because the tribal court proceedings were

* * *

with the jurisdictional analysis upon which this case turns. However, to ensure that the Court is not misled about the role insurance does or does not play in this case, the Co-op would add the following background facts regarding that issue.

In January, 1994, while the underlying tribal court case was on appeal in the tribal court system, the Defendants herein and their wives filed a second tribal court action, against the Co-op and its insurer, Federated Rural Electric Insurance Cooperative (Federated), seeking a declaration that there is insurance coverage available for their judgment against the Co-op. Plaintiff's Statement of Genuine Issues, ¶ 53. Both Federated and the Co-op moved to dismiss, for lack of jurisdiction, among other bases. Id.

at ¶ 54. The Defendants opposed those motions, and filed a motion for summary judgment on the coverage issue. Id. at ¶ 55. Without deciding the motions to dismiss, tribal court judge Don Sollars signed an order on September 12, 1994, drafted by counsel for the Defendants, granting them summary judgment on coverage. Id. at ¶56.[1] Federated timely filed a Notice of Appeal to the Blackfeet Court of Appeals in 1999, but the appeal has never been acted upon. Id. at ¶ 57. Thus, the matter of insurance – while completely irrelevant to the jurisdictional analysis – is not as simple as the Defendants would have the Court believe.

* * *

[1] Judge Sollars is the same judge who ruled in 1988 that the Blackfeet Tribe did not have authority to impose taxes on the Co-op. Plaintiff's Statement of Undisputed Facts, ¶¶ 47 and 56. He is also the tribal court judge who recently issued orders in the original tribal court action assisting the Defendants in their efforts to enforce the judgment. Id. at ¶¶ 41, 44, 45, 45, 52 and 56.